statement, but -- I wasn't listening to every word, but I was listening to the ones that caught my attention, and "misappropriated" was one that I enjoyed, because he said Universal entered into this covenant not to sue with Coleco, it misappropriated, and this was unjust enrichment.

What did he leave out of the sentence? The direct object. Misappropriated what? Well, the fact of the matter is they can't claim we misappropriated anything. And if your Honor wants to see their slight of hand, their ledger domain, look at their complaint -- I mean, their counter claims and see the way they pleaded it. Then look at our first brief -- when I say our first brief, we have submitted two, one for a summary judgment, one responding to their trial brief -- and then look at their trial brief after we argue.

They changed it all around and they came up with this very ingenious 14th century derivative of unjust enrichment, because that's all they had. And what really shot them dead was the testimony of Mr. Greenberg of Coleco, because they went into this making the claim that because Universal signed a covenant not to sue with Coleco, Coleco's pricing of the Donkey Kong cartridges that it was selling and its pricing of the Donkey Kong table top game had to change, and this affected their rights.

That was their theory. Mr. Greenberg said no,

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our prices were well in advance, our pricing was only changed in response to marketing conditions like everyone else, had nothing to do with that. Boom, that's the end of that theory, they've got to come up with something else.

They came up with a good theory except a real problem. It's based on a false factual proposition, that Universal misappropriated Donkey Kong, and also a legal proposition runs into real difficulties which, your Honor, begins to focus -- if he ever does, and I hope he does not -- on the proposition, how do you impair a trademark copyright other than by infringing them?

You can read all the cases you want, you do not find the concept of impairment of trademark, and the only concept of impairment of copyright is when you license someone and they fail to put the copyright notice. Something like that, throws it into public domain. That is impairment of a copyright, the old statute. The one that was succeeded by the 1976 account had the word "impairment," and that's what it refers to, things that licensees could do or owners could do. That was impairment. I have never read a case where there was impairment of a copyright or a trademark in the way these people are using it in this case. If your Honor wants to make new law on that you will have the opportunity, I suppose, but there is no such holding.

As far as misappropriation is concerned, let me

just say this. Our second brief says about all I am capable of saying here. I have a case, it was decided at the same time that these people or shortly before these people began -- when I say "these people," I now mean my own people, Universal -- began licensing King Kong and exploiting their King Kong rights, and it was with Jaws.

I've got a court that uses the exact same language -- misappropriating Universal rights in Jaws. And another infamous character you've heard, a witness in that, he was familiar with the case, and if Mr. Kirby doesn't know what misappropriation of merchandizing rights are, at least people at Universal knew and at least the people at Ruby Spears knew as well, it's in the same contract that Nintendo has with Ruby Spears. You'll see the terms, misappropriation of merchandizing rights.

The concept is merchandizing rights. Mr. Kirby is going to cross-question all of these witnesses about what they think they mean by it. They are all lawyers and we will have lot of fun at that. That's what he does with Mr. Sheinberg for page upon page upon page, and if that's probative evidence to your Honor, so be it, I don't see how it is. It's the cases that make that, that's law and Mr. Kirby can't change it. It doesn't make any difference whether he likes it or not. There is a concept of merchandizing rights, people know what it's about, and when

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A. My first involvement was in June of 1981 when I met Mr. Arakawa, the president of Nintendo of America in my offices at Sax & MacIver.

Q. Was Mr. Arakawa there in connection with retaining you?

A. Yes, he retained me and my law firm to represent Nintendo.

Q. Now, at the time you were first retained by Nintendo of America by Mr. Arakawa, can you describe Nintendo of America for the court?

A. It was a very small company. Originally it had -- Nintendo of America had been incorporated in New York State and it was located here in the city. That was in April 1980. In the spring of 1981 Mr. Arakawa moved the headquarters of Nintendo of America to the Seattle area. At that point in time the company was engaged in the assembly and sale in the United States of arcade video games.

Q. Now, do I understand correctly that Nintendo of America is a subsidiary of a Japanese company, Nintendo Company, Ltd.?

A. Yes, it is. It's a subsidiary of Nintendo Company, Ltd., of Kyoto, Japan.

Q. And would you describe Nintendo Company, Ltd., at the time you were retained by Mr. Arakawa?

A. Nintendo Company, Ltd., is a fairly large Japanese corporation that's been in existence since 1899. It's been in the -- it's manufactured cards, it's been in the toy and game business. In the 1970s it entered the video game business.

Q. Now, Mr. Lincoln, I am going to ask you to describe in very general terms your relationship with Nintendo of America from the time you were first retained by Mr. Arakawa in June of '81 until January of 1983 when you resigned from Sax & MacIver and became executive vice-president and general counsel of Nintendo of America.

A. Originally I was asked by Mr. Arakawa to assist in obtaining trademark and copyright counsel. The company was about to introduce Donkey Kong. In fact, that was my -- at my first meeting he told me about the Donkey Kong game. Throughout the rest of 1981, I performed general legal matters. In the winter of '81 I started getting involved with licensing. Mr. Arakawa asked me to prepare the license agreement between Coleco and Nintendo.

In 1982, at the beginning of '82 I began -- became heavily involved in merchandise licensing as well as other legal matters. By 1982 I was virtually working for Mr. Arakawa and for Nintendo full-time. That continued until the end of 1982 when I joined the company.

Q. Now, Mr. Lincoln, you said that in June of '81

when you first met Mr. Arakawa, in that period, Nintendo of America was a very small company. Would you tell the court what the fiscal year 1981 revenues for Nintendo of America were and its earnings?

A. The fiscal year end is August 31st. The fiscal year end August 31, 1981, the company's sales were about $4.7 million, its revenues about $64,000.

Q. Now, in July of 1981, Donkey Kong was introduced into the United States; is that correct?

A. It was really August of '81.

Q. August of '81. What were the earnings of Nintendo of America for the fiscal year ending August of 1982?

A. It was $111 million in sales and $25 million in -- excuse me, $22 million in revenues.

Q. In earnings?

A. In earnings, excuse me.

Q. Now, Mr. Lincoln, prior to Donkey Kong's introduction in the United States, had it been introduced in Japan?

A. Yes.

Q. Can you tell me approximately how long before its August '81 introduction in the United States?

A. It would have been June or July of 1981 that the game would have been introduced in Japan.

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Q. Now, with respect to the Donkey Kong game that was introduced originally by Nintendo, was that a video arcade game?

A. Yes.

Q. And is that the video arcade game that is in the courtroom today?

A. That's it.

Q. Now, can you describe the sales history of Nintendo of America of Donkey Kong video arcade games in the United States?

A. The game was introduced in the U.S. in August of '81, and August and September the sales were 300 to 400 units a month. The game really took off in October of '81. I believe there was almost 4,000 games sold that month, and then it went up from there. In the spring of '82 they were selling up to 7,000 units a month. For example, in June of '82, I think it was 7,000 units, in that area. Total sales of the Donkey Kong arcade game were 58,000 units. That's of the uprights and of the table, the cocktail table models.

Q. And that's in North America?

A. U.S. and Canada, yes.

Q. Now, Mr. Lincoln, what you have just been telling us are Nintendo's sales, presumptively to its distributors?

A. Yes.

Q. Who then resell to place in arcade locations?

A. Yes. The way the business works is that Nintendo is a manufacturer, sells -- like other arcade video game manufactures, sells to a group of distributors and various locations in the U.S. and Canada. Those distributors in turn sell to operators who place the games either in arcades or in street locations.

Q. Mr. Lincoln, is there an available measure to show Donkey Kong's popularity in terms of the consumer?

A. The real measure of a video game is how many quarters go into it on a weekly basis, that's what the business is all about. Both Nintendo and other manufacturers keep an eye on the coin drop or the collections of quarters, and there is some reporting of the popularity of video games in trade magazines such as Replay, and the other magazine is Playmeter.

Q. Where does Donkey Kong stand in these reports in terms of consumer playing, coin drop, as you say?

A. For Replay it was in the top ten between November of '81 and January of '83, which is a very good run. In Playmeter it was No. 1 January through April, but the game was in the top ten with Playmeter through '82 and '83, too.

Q. Is it fair to say that Donkey Kong was one of the most popular video arcade games ever introduced?

A. It was the most popular arcade game ever introduced with the exception of Pac Man.

Q. Now, did there come a time, Mr. Lincoln, when Nintendo entered into an agreement to license a home video game?

A. Yes.

Q. When was that?

A. The oral agreement between Nintendo and Coleco was in November of 1981. The license agreement itself was signed in February, February 1 of '82.

Q. Now, at the time that Nintendo was entering into the oral agreement with Coleco, what did Nintendo know about Coleco's plans for Donkey Kong?

A. We knew that Coleco was about to introduce a home video system called Colecovision that would be competing with Atari and Mattel's Intellivision. And we knew that their plans were to pack in the Donkey Kong cartridge and to introduce the Colecovision unit with the Donkey Kong cartridge. Those plans were announced by Coleco in the trade press, also at the consumer electronics show in January of '82 and at Toy Fair here in New York in February of '82.

Q. Did the consummation of the license between Coleco and Nintendo and the various public announcements you have just testified to have any affect on the business

Q. And who represented Universal at that meeting?

A. Mr. Hadl, and I met an outside counsel, Mr. Kroft.

Q. And was Coleco present at that meeting?

A. Yes. I met Mr. Schwefel and Mr. Fred Yerman, who was with the Kaye Scholar firm, outside counsel to Coleco.

Q. By the way, prior to that May 6 meeting, had you ever met Mr. Schwefel before?

A. I had never met him and I never talked to him.

Q. Prior to the arrangements for that meeting?

A. Right.

Q. Now, I take it, therefore, that prior to the meeting at Universal's headquarters, was it?

A. It was at Universal City on the Universal City Studios lot.

Q. Did Nintendo have any private meeting with Coleco?

A. No.

Q. When you arrived, when you and the other Nintendo representatives arrived at Universal, were the representatives of Coleco already there?

A. Yes, they were in Mr. Hadl's office.

Q. And who is Mr. Hadl, by the way?

A. Robert Hadl, he is an executive with Universal.

I don't know his title.

Q. Now, Mr. Lincoln, just so we can have some time parameter on this, from the time the meeting came to order when Universal, Coleco and Nintendo representatives were all there, until the time the meeting finally broke up, about how much time elapsed?

A. It was about an hour-and-a-half meeting.

Q. Were you in continuous session with Mr. Hadl and Mr. Kroft?

A. No. There was a short meeting with everyone, Nintendo and Coleco and Universal people. Then there was an adjournment where we met the Nintendo people and the Coleco people met, and then there was a further meeting back in Mr. Hadl's office with everyone present.

Q. Now, focusing just on that first segment of the meeting when everyone was together prior to the time Coleco and Nintendo met privately, will you please tell the court what transpired.

A. We went into Mr. Hadl's office. He introduced Mr. Kroft. Mr. Hadl began by commenting that, of course, we all knew why we are there, that Universal had sent this telex out, that it owned the rights in King Kong, that it considered the Donkey Kong game to be an infringement of those rights.

He made a comment that, "As you well know, I am

sure know, Universal is very litigious, but in this matter, we would like to see if we can get this resolved and settled and we would propose that Nintendo and Coleco pay a seven percent royalty." After he got through saying that, my partner, Mr. McGee, asked him a few questions, and the one that I remember is, "Well, Mr. Hadl, is this a copyright claim or a trademark claim?" He said, "Well, it's a trademark claim, it really isn't -- we are not claiming any -- that there is any copyright violation, but I want to reserve that," and that was understood.

At that point I said to Mr. Hadl that perhaps it would be productive if representatives of Nintendo and Coleco adjourn and discussed what Mr. Hadl had said, and he agreed to that.

Q. And I take it you then did adjourn as you previously testified?

A. We went to the office next door, yes.

Q. Were the same people you previously identified as representing Coleco and Nintendo present at that private meeting?

A. Yes.

Q. What was discussed at that meeting?

A. Well, Mr. Schwefel made it very clear that Coleco wanted to settle this thing on the spot, that they were very, very concerned about it, that they were just

about ready to introduce Colecovision. He was under a lot of pressure, and he expressed a very firm conviction that he wanted to settle. He said, "I've got my checkbook and I can't go back to Hartford, I want to get this thing settled."

I said, "Look, this thing is really perplexing. I am not going to settle this claim until we find out what it is that they own. We have done some work, we have looked at these trademark searches and everything and we just don't know what it is that they own, and even if they owned something, I don't understand how this Donkey Kong game can infringe on King Kong."

So I said, "Look, before we talk about settlement, why don't we go back in there and let me say to Hadl that we can't talk about settlement until we get some evidence of what their rights were."

So we agreed to do that. We went back into Hadl's office.

Q. Now, when you returned to Mr. Hadl's office, was Mr. Kroft still there?

A. Yes.

Q. Now, how long were you back in Mr. Hadl's office after the return?

A. Not too long, about 15 minutes.

Q. Who reported on the private meeting?

A. I did.

Q. What did you say and what transpired at that 15-minute session about what you are now testifying?

A. I said that we -- Mr. Hadl, that we had a very productive meeting with Coleco but that we really had a problem and it was premature to discuss settlement until we had evidence, could see some evidence of what it was that Universal owned in King Kong and also how the Donkey Kong game could possibly infringe. I said we were particularly interested in getting some explanation of what Universal's rights were in King Kong.

He said, "Well, you know, we own all of the rights. The matter is open and shut." I said, "Well, look, what I would like is I would like a chain of title, a title report." And he looked at me like some kind of a rube or something and said, "Well, you what?" I said "I want a chain of title." He said, "Well, I will give you an indemnification, indemnify you and Coleco." I said, "I do not want an indemnification, I want a chain of title. I don't want to buy the Brooklyn bridge." And he and Kroft looked at me, and finally Mr. Hadl said, "Well, all right. Mr. Kroft here will send you your chain of title." I said, "Thank you."

That's basically what happened.

Q. What did you understand him to mean when he said he would give you an indemnification?

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A. Just that he would indemnify and hold Nintendo harmless from the claims of anybody else in King Kong. That's what I understood it to mean.

Q. Now, immediately after that meeting, did you receive a chain of title laying out Universal's rights in King Kong from Mr. Kroft or Mr. Hadl?

A. No.

Q. Did you ever receive a chain of title he said he would send to you?

A. No.

Q. During the course of either the first or second portion of that meeting, did Hadl or Kroft describe any source for Universal's rights in King Kong?

A. The only thing I recall is that they said they owned King Kong. They owned the rights, all of the rights. I don't recall them indicating any source for those rights.

Q. Did they say that they owned the movies?

A. Just said they own everything. That's why I asked for the chain of title. I was quite frankly suspicious of that.

Q. Now, Mr. Lincoln, you remember that in the telex they -- this is Plaintiff's Exhibit 14 for identification. On the third line -- second line, excuse me, Universal says that it's the sole and exclusive owner of all rights, and then it says "except book publishing rights." Did they in

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the meeting tell you that they didn't own book publishing rights?

A. No, we didn't -- the only discussion that I recall of the telex was simply Mr. Hadl referring to it at the outset of the meeting, you know, "We are here because we sent you a telex."

Q. Well, during the course of the meeting, did they state any limitation on Universal's rights, book publishing or otherwise?

A. No.

Q. Now, after the meeting broke up in Mr. Hadl's office, did you immediately leave Universal City studios?

A. No. At the conclusion of the meeting with in Mr. Hadl's office Mr. Hadl said that he would like Mr. Arakawa and me to meet Mr. Adler who was an officer of Universal involved in merchandising, and he would like to have us have a discussion with Mr. Adler concerning the possibility of maybe Nintendo acquiring some of the Universal properties for video games.

So Mr. Arakawa and I accompanied Mr. Adler to another floor of the -- in the building, and we had that discussion with him.

Q. And briefly, what transpired in the meeting with Mr. Adler?

A. Oh, Mr. Adler indicated that Universal had a

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it was a table top game at that point, and I said, "Schwefel says that this is a knock-off of -- it's a Tiger King Kong game and it's a knock-off of Donkey Kong." And he said yes, Tiger was a licensee of Universal, they licensed them in September of '81 to do the -- to do a King Kong video game. He said that this had been Mr. Adler's responsibility and that Adler had not properly monitored it or followed it, that when Universal had received a catalog or a brochure or something to that effect they had made a determination that it was a knock-off of the Donkey Kong copyright, and he said that Mr. Sheinberg had hit the roof -- those were his words -- and that Universal had cancelled the Tiger license. So that was about it.

Q. Did he tell you the status of the title report?

A. No.

Q. Did he mention that he wasn't going to send it to you?

A. No.

Q. When was your next conversation with Mr. Hadl?

A. He called later that week, I believe it was the 17th of May, and he said that he was getting pressure to file a lawsuit from -- by his management. He asked me if I had talked to Mr. Arakawa about the proposals that he had made, and I said that we -- that I had talked to Mr. Arakawa. He said, "Well, we've got to get this thing

resolved." I believe I said, "Well, we are certainly willing. Mr. Arakawa is willing to sit down with you and we will come down to Los Angeles and sit back down with you and discuss it." He said, "Fine." And we set up a meeting for the 21st in Los Angeles.

Q. All right. Now, between May 17th and the meeting on May 21st, did you have any other telephone conversation with Mr. Hadl?

A. He called me the next day to say that Mr. Sheinberg, the president of MCA, would be joining our meeting, our luncheon meeting. He said, "You know, I hope that you people come down with something that's specific and something concrete to offer to dispose of the claim." I said that we would come to Los Angeles. We did.

Q. Was that the first time that Mr. Sheinberg's name had come up in connection with Universal's claim?

A. The first time I heard about Mr. Sheinberg was at the May 6 meeting in Mr. Hadl's office.

Q. And in what connection was his name brought up?

A. I was just -- before we sat down I -- Mr. Hadl's office has a sweeping view of the, I guess it's the San Fernando Valley, I'm not sure, whatever valley is down there, and there were some buildings which were obviously movie studios. You could also look down on the Universal studios which were quite impressive. And I said, "Well,

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what's that over there?" He said, "Oh, that's Warner Communication or Warner Brothers."

He said, "My brothers, Mr. Sheinberg and Mr. Ross," who I knew was the chairman of Warner Communications, they play golf or they do something together, "and Mr. Sheinberg is very jealous of Mr. -- of Warners because they have made a lot of money in the arcade" -- or excuse me, "in the video game business."

So he then said -- and I think he was just really passing the time of day -- he said, "So, you know, we are really very interested in this business, because the business was exploding at that point in time." So that was when I first learned about Mr. Sheinberg. So when he called me, I knew who Mr. Sheinberg was.

Q. Now, did you in fact have the meeting on May 21st?

A. Oh, yes. Yes, we did.

Q. Where was that meeting?

A. It was in the private dining room on the Universal City studios lot.

Q. Who was there?

A. Mr. Arakawa and I flew down. We met Mr. Hadl in his office. We walked across the lot to the dining room. Then we waited a few minutes and we were joined by Mr. Sheinberg. We had lunch with the two of them.

Q. How long did that luncheon last?

A. It was about an hour.

Q. Now, will you tell the court what transpired during lunch.

A. Mr. Sheinberg asked me to tell him about Nintendo, and I explained what -- something about Nintendo, who they were. We then got into a discussion of the video game business, and he was interested in the business that we were in. We may have talked about Atari and Warners and other companies in the business. He then said, "Well, this is a really very serious matter. We've got this claim against you and we've got to get it resolved." I said, "I know that." And he said, "I hope that you don't misunderstand when we say we want to try to settle this because," he said, "your company or your client is a Japanese corporation, and I hope they don't have a misunderstanding like the fellow that I had a meeting with who was the president of Sony," and he mentioned the Beta Max case which was then before the Supreme Court.

Then we proceeded on with the lunch, and when lunch was over I said -- or Mr. Sheinberg said, "Do you have anything to report?" I said, "Yes, I do." I said, "We have decided not to pay you anything." I said, "Let me explain why." I said, "When we got this telex we were very concerned, so we went back and we checked and rechecked our

homework, we looked at the -- both the trademark search that we had done in Japan, we looked at the search that we had done in the United States, we looked at the opinion letter that we had received from outside counsel." I said, "After the telex came we did a search report for King Kong, we reviewed that. We engaged trademark counsel in New York City, asked them to review the matter and had come to the conclusion that we didn't think that we had done anything wrong and that we had some real question about Universal's rights."

So I said, "Mr. Sheinberg, because I don't think we did anything wrong here, we aren't going to pay you any money. However, Mr. Yamauchi and Mr. Arakawa are very interested in exploring business and we are prepared to proceed on that right away. Mr. Hadl has mentioned a joint venture and a movie and this and that. We are very interested in that. We are also interested in the properties that Universal has and the titles, etc., for video games." And I said, "I am not asking that you dismiss your claim," I said, "if you will just shelve it for a month or so, just put it aside while we explore whether we can do business together, then we can do business together, maybe we can resolve the claim that way."

Mr. Sheinberg said, "I don't understand why you came all the way down here to tell me that." And I said,

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"Well, I came down to tell you that we hadn't done anything wrong and I wanted to explain why we felt that we hadn't done anything wrong." And he said, "Well, you better start saving your money for attorneys' fees," pushed back his chair and stood up. At that point the meeting adjourned.

Q. As the meeting was adjourning, did you have any further conversation with Mr. Sheinberg?

A. He asked me, he said, "Are you and Mr. Arakawa going back to Seattle?" And I said, "Well, I've got to go up and get my briefcase in Mr. Hadl's office and I wanted to talk to him for just a minute about Tiger." And Mr. Sheinberg said, "Well, I don't want you talking to Hadl, Mr. Hadl about Tiger because we've got some surprises in store for you on Tiger." At that point we walked out the door and walked across the lot back up the elevator, and that's the last time I have seen Mr. Sheinberg.

Q. Now, the lawsuit in this action was filed on -- excuse me, strike that.

Mr. Lincoln, at any time during the course of that conversation did Mr. Sheinberg describe his litigation department at Universal?

A. Yes, he said that -- I think that was pretty much at the outset of the conversation. He made -- he basically said the same thing that Hadl had told me, which was that Universal has -- you know, is very litigious, and

he made the comment that Universal's litigation department turned a profit or was a profit center or something to that --

Q. Now, between the May 21 meeting and the June 29 filing of the lawsuit in this matter, did you have any further conversations with Hadl or any other Universal representative?

A. I think it was on the 16th of June -- I've got to tell you, Mr. Kirby, I can't see that, so -- it's kind of blurry -- but it was the 16th of June.

Q. All right. That is the next date, the chart reflects a conversation. Did you call him or did he call you on the 16th of June?

A. He called me. He said that they were getting ready to file their lawsuit. And he told me that -- that Universal had entered into a settlement agreement with Coleco under which Coleco was going -- he just said that under this agreement, Coleco was going to be paying Universal three percent of the sales of the Donkey Kong video game, and he commented that he thought that the settlement agreement would hurt Nintendo. And I think he, again, as he did in all of our phone conversations, urged us to settle, kept saying, you know, "We want to get this thing settled but we are getting closer and closer to litigation." So that was the -- that was the June 16 phone

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Q. Did Nintendo ever inform a licensee that the proposed art work or product would have to be redesigned?

A. Occasionally that happened.

Q. Were each of the Nintendo licensees required to indicate anything with respect to Nintendo on their product?

A. They had to indicate that Donkey Kong was a trademark of Nintendo of America, and we also asked them in certain cases to put a Nintendo copyright mark on the product.

Q. Mr. Lincoln, have you heard of a company called Union Underwear?

A. Yes.

Q. What does Union Underwear make?

A. They -- I have a list of these licensees, Mr. Fairhurst.

MR. FAIRHURST: Just so long as I know what it is the witness is referring to. He is now referring to some notes and I have not seen the notes, and if he is going to be questioned about that, are they going to be used to refresh his recollection? I would just like to see it.

Q. What does Union Underwear make, Mr. Lincoln?

A. They manufacture T shirts, I think the word in the trade is knit tops, under the Fruit of the Loom and BVD labels.

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Q. At the time of the announcement of the Universal lawsuit against Nintendo, did Nintendo have a license agreement with Union Underwear?

A. No.

Q. Had there been any discussions between Nintendo and Union Underwear about a license?

A. Yes. We had had discussions with Union Underwear going back to March of 1982. We had received product samples, we had approved the product sample or the product. The only thing we hadn't gotten around to was finalizing the license agreement.

Q. Had an agreement been reached on the guaranteed royalty provision?

A. Yes.

Q. And what was the amount of the guaranteed royalty?

A. $40,000.

Q. Was the agreement between Union Underwear and Nintendo ever executed?

A. No.

Q. Why was it not executed?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. In early July of '82 I had the license agreement, the draft license agreement in my office. I received a

phone call from the Union Underwear attorney indicating that the attorney indicated that she was aware of the litigation. I briefly explained the litigation and said that we would add an indemnification clause indemnifying Union Underwear against any claims that Universal might assert. She said that was fine.

A day or so later I got a phone call from the general counsel of Union Underwear indicating that they had decided not to proceed with the license because of the litigation. She said that they would rather wait the outcome of the litigation, and she asked me to send the license agreement back, which I did.

Q. Did Union Underwear and Nintendo ever enter into a license with respect to Donkey Kong?

A. No.

Q. Are you familiar with a company called Gabriel Industries?

A. Yes.

Q. What do they produce?

A. They make a squeeze toy.

Q. At the time the Universal lawsuit was filed, did Gabriel have a license with Nintendo with respect to Donkey Kong products?

A. No, like Union Underwear, we were in the process of negotiating that license.

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Q. Approximately how long had you been in negotiations with Gabriel Industries?

A. My recollection is it was several months. But I am not positive of that, Mr. Kirby. I know that we had gotten to the point of preparing license documents which would indicate to me that this license had gone through Mr. Gershin and had also -- there had been some discussions at Nintendo with respect to the license.

Q. Had you reached an agreement on the guaranteed royalty provision?

A. That we had.

Q. And what was the amount of the guaranteed royalty of Gabriel Industries?

A. $20,000.

Q. Did Gabriel execute a license agreement with Nintendo?

A. No.

Q. Did they refuse to execute a license agreement with Nintendo?

A. They did.

MR. KIRBY: Your Honor, I am going to be referring to certain exhibits in evidence. I am now going to show the witness Plaintiff's Exhibit 28 which was cross-designated and offered by us.

Q. Would you please look at Plaintiff's Exhibit 28

in evidence, Mr. Lincoln, and tell me if you can identify that letter.

A. I can identify it. It was -- a copy came to me.

Q. And did you receive that copy at or about the time the letter was written?

A. Yes.

Q. Would you read the first two paragraphs of that letter?

A. The letter is addressed to Bob Gershin. "Dear Bobby. Due to the current trademark infringement suit pending on the Donkey Kong name, our legal counsel has advised us not to pursue this property further. Therefore, we will not proceed to manufacture a Donkey Kong squeeze toy."

Q. Did you personally have any conversations with anyone from Gabriel regarding their decision not to proceed with the license for Nintendo?

A. That I don't recall.

Q. At any time subsequent to your receipt of this letter, did Nintendo and Gabriel reach an agreement on the Donkey Kong license?

A. No.

Q. During the months immediately after the Universal lawsuit was filed, did it come to your attention that any of Nintendo's licensees had been contacted by

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A. I wasn't including Coleco.

Q. During the period June 29, 1982, through January 3, 1983, did any Nintendo licensee fail to honor its agreement with Nintendo?

A. To December --

Q. Through January 3, 1983.

A. No.

Q. After January 3, 1983, you testified some Nintendo licensees failed to carry out their license?

A. That's correct.

Q. Can you tell me approximately how many told Nintendo that they were not going to continue with their license?

A. Well, I have seven on my list, but -- and those are the ones that clearly told us that.

Q. Are you familiar with the company called Trim Line?

A. Yes.

Q. Was Trim Line a Nintendo licensee on January 3, 1983?

A. Yes, they were.

Q. When type of products does Trim Line produce?

A. Donkey Kong belts.

Q. Did Trim Line take any action after January 3, 1983 with respect to its Nintendo license?

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A. They did, they ceased production.

Q. Let me show you what has been introduced into evidence as Plaintiff's Exhibit 33, which is a letter from a law firm, Honig & Smerling addressed to Nintendo America, dated January 7, 1983, showing a cc to Howard C. Lincoln, Esq. Did that letter come to your attention sometime on or about January 7, 1983?

A. Yes.

Q. Now, Mr. Lincoln, did you respond to that letter?

A. I recall that I did, yes.

Q. How did you respond to that letter?

A. I wrote their attorney, Mr. Honig.

MR. KIRBY: And that is in evidence as Defendant's Exhibit 30, your Honor.

Q. In that letter, did you urge Trim Line to continue producing Donkey Kong products?

A. Yes, I believe I did.

Q. After that letter, did Trim Line continue to produce Donkey Kong products?

A. No.

Q. Does Trim Line continue to pay royalties to Nintendo?

A. No.

Q. Does Trim Line still owe Nintendo royalties under the guaranteed royalty provision of its agreement?

A. They owe us $10,000.

Q. Are you familiar with the company called Charleston Hosiery?

A. Yes.

Q. Was Charleston Hosiery a licensee of Nintendo on January 3, 1983?

A. Yes, it was.

Q. What products did Charleston Hosiery produce under its license with Nintendo?

A. Donkey Kong socks.

Q. Did they take any action with respect to their license with Nintendo after January 3, 1983?

A. They ceased -- they advised us that they were going to cease production and sale of socks.

Q. Let me give you, Mr. Lincoln, what is in evidence as Defendant's Exhibit 33 which is a letter from Charleston Hosiery addressed to a Ms. O'Neil at Mudge, Rose showing copies of Nintendo of America and Susan Schoenecker dated January 19, 1983. Did this letter come to your attention on or about the time it was sent by Charleston Hosiery?

A. Yes, it did.

Q. Would you please read the first three paragraphs of that letter.

A. "Dear Ms. O'Neil. We are in receipt and

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appreciate your letter of January 13 offering to indemnify us against any legal action that might be taken against us by Universal City studios. As you can see from the attached wire, they have threatened to take action against us. We greatly appreciate the fact that Nintendo of America is doing what they are to protect us, but threat of suit is the least of our worries." Do you want me to keep reading?

Q. Yes, continue.

A. "The main problem is the fact that the customers are aware of the impending litigation and as a result have elected not to purchase our merchandise for fear of getting involved. As a result, this has put a real crimp in our ability to sell Donkey Kong socks. We look forward to discussing this problem with the people at Nintendo."

Q. After you received this letter, did Nintendo seek to retain Charleston Hosiery as a licensee?

A. Yes, we did.

MR. KIRBY: Your Honor, for purposes of the record, in evidence there are letters marked Defendant's Exhibit 34 and Plaintiff's Exhibit 47.

Q. What was Charleston Hosiery's response?

A. They responded that -- that they were unable to sell in the product, and ultimately when we asked them or we proposed to them that we would be willing to retain the

license for another year so they can work off their guarantee, they said that while they appreciated that, that that wasn't going to help them out. By then I think they indicated it was just too late.

Q. Let me show you, Mr. Lincoln, what is in evidence as Defendant's Exhibit 35 which is a letter from Charleston Hosiery to Susan Schoenecker of Nintendo of America dated January 6, 1984. Did you see a copy of that letter?

A. Yes.

Q. At or about the time it was received by Nintendo?

A. Yes.

Q. Would you please read the second paragraph of that letter.

A. "We also have the agreements that clearly indemnify us relative to the threatened lawsuits over the name Donkey Kong. The trouble with these two documents is that they are after the fact. The threatened lawsuits did their damage at a time when there was interest in Donkey Kong and when we expected to sell the merchandise. As you know, time is everything in sales, and once that period of time expired and once our potential customers had been temporarily scared off, the ability to reassure them that there would be no problems went to little avail."

Q. Mr. Lincoln, did Charleston Hosiery continue to

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Produce products under its license with Nintendo?

A. No, they didn't.

Q. Did Charleston Hosiery ever pay the balance of the royalties owed under the guaranteed royalty provisions of its license?

A. No.

Q. How much does Charleston Hosiery owe Nintendo?

A. $7500.

Q. Are you familiar with the company called Bates Night Wear?

A. Yes.

Q. Was Bates Night Wear a Nintendo licensee in January of 1983?

A. Yes.

Q. What type products did Bates Night Wear produce under its license with Nintendo?

A. Donkey Kong sleepwear.

Q. Did Bates Night Wear take any action after January 3, 1983 with respect to its Nintendo license?

A. They ceased production of any further goods and they advised us that they were holding in escrow $800 that was due us under the license agreement.

Q. Did Bates Night Wear produce any further products under its Donkey Kong license to your knowledge?

A. No.

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Q. Did Bates Night Wear eventually pay the $800 in royalties due Nintendo that they said they were holding in escrow?

A. Yes, they did.

Q. Do they continue to be a licensee of Nintendo's?

A. No.

Q. Are you familiar with the company called Super Shirts?

A. Yes.

Q. Was Super Shirts a Nintendo licensee on January 3, 1983?

A. Yes.

Q. What type of products did Super Shirts produce under its license from Nintendo?

A. T shirts.

Q. Did Super Shirts take any action after January 3, '83, with respect to its Nintendo license?

A. They cease the production of T shirts, and I recall that they advised us that they informed their sales force not to solicit any further orders.

Q. Let me show you what is in evidence as Defendant's Exhibit 24, which is a letter from John C. Bates of Super Shirts to Howard C. Lincoln dated January 29th, 1983. Mr. Lincoln, did you see that letter at or about the time it was sent?

A. Yes.

Q. Would you please read the second and third paragraphs of that letter.

A. "Dear Howard. First, due to the nature of our clientele, Super Shirts cannot afford to be associated with products with respect to which there is any questions about our right to manufacture and distribute. The good will we have developed with our customers is too important to jeopardize by dealing in such products.

"Second, we are extremely disturbed that we were not informed of the pending litigation before our licensing agreement became effective and we began marketing Donkey Kong products in July. Obviously, had we been aware of the situation we would not have gone forward with the licensing arrangement."

Q. Did Nintendo make any effort to retain Super Shirts as a licensee for Donkey Kong products?

A. I wrote Mr. Bates a response to this letter and tried to explain that we had entered into a license with him or with his company before the litigation had commenced and urged him to continue with the license.

Q. Let me show you what is in evidence as Defendant's Exhibit 25, which is a letter dated April 18, 1983, from Mr. Bates addressed to you. Did that letter come to your attention at or about the time it was sent?

A. Yes.

Q. Would you please read the first three paragraphs of that letter.

A. "Dear Howard. Regarding your letter of February 3, 1983, on January 29, 1983, we informed our sales staff to cease all solicitation of orders for Donkey Kong products. We have liquidated our stock balances. As I mentioned in my last letter to you, it is our policy to refrain from selling any products to our customers if there is any question as to rights of ownership, validity of trademark, etc. The J.C. Penny Company is one of our largest customers, and our agreement with them precludes us from selling them any product involved in any litigation -- in a litigation over the rights of ownership."

Q. Will you continue.

A. "So you can see we can't market your product to our largest customers because of the existing problem between yourself and Universal studios. We cannot and will not endanger the good will between ourselves and our customers under any circumstances."

Q. Did Super Shirts after this correspondence continue to be a Nintendo licensee and sell Donkey Kong products?

A. No.

Q. Does Super Shirts still owe Nintendo royalties

under the guaranteed royalty provision of its license agreement?

A. Yes, they do. $7,302.13.

Q. Are you familiar with the company known as House Glass?

A. Yes.

Q. Was House Glass a Nintendo licensee on January 1983, January 3rd, 1983?

A. Yes.

Q. What type of products did House Glass produce under its license with Nintendo?

A. Donkey Kong mugs.

Q. Did House Glass take any action after January 1983 with respect to its any Nintendo license?

A. They ceased production.

Q. Did House Glass thereafter remit any royalties to Nintendo?

A. No.

Q. Did House Glass advise you as to why they had ceased production?

A. Because of the pendency of this litigation.

MR. KIRBY: Your Honor, this is Defendant's Exhibit 28 in evidence.

Q. Does House Glass still owe Nintendo royalties under the gauranteed royalty provisions of its license

agreement?

A. Yes.

Q. How much?

A. $14,417.28.

Q. Are you familiar with the company known as Manton Cork?

A. Yes.

Q. Was Manton Cork a Nintendo licensee on January 3rd, 1983?

A. Yes, they were.

Q. Which type of products did Manton Cork produce under its license?

A. Donkey Kong cork boards.

Q. Did Manton Cork take any action after January 3, 1983, with respect to its license?

A. They ceased production.

Q. Let me show you what is in evidence as Defendant's Exhibit 57 which is a letter from Ralph A. Manton dated September 21, 1983, to Nintendo of America. Did you see that letter, Mr. Lincoln, at or about the time it was sent?

A. Yes.

Q. Would you please read the second paragraph of that letter.

A. "As a consequence of this trademark dispute

between you and Universal, whether right or wrong, in their direct threat to charge us to a trademark infringement unless we cease and desist, they frustrated and materially interfered with our licensing agreement and exposed us to potential serious liability, loss and damage."

Q. Now, Mr. Lincoln, did Nintendo make any effort to retain Manton Cork as a licensee after it indicated it was not going forward?

A. I recall that we did. I think this fellow also wanted us to pay back the $5,000 that he had paid as an advance royalty, so I know I wrote him about that, and also asked him to continue with the license agreement.

Q. Now, Mr. Lincoln, did all of the licensees about which you have just testified refuse to pay their gaurantee royalties to Nintendo?

A. Yes.

Q. Now, did Nintendo have any program they had generally applied to try and retain these people as licensees?

A. Yes, we did.

Q. And would you describe that program.

A. Well, we tried a couple of things. We tried when we got phone calls or inquiries from licensees regarding this litigation, we tried to assure them that we were fighting these people and that we were confident that

we would win. We offered to indemnify, to give them an indemnification to the extent that we might not have already done that. We offered to extend their licenses so that they could work off their guarantees, and in general I think we tried to do everything we could.

I think the other thing we did was to try to convince them that Donkey Kong was a very popular character and that we were very positive about it and that the program was going on and that Ralston Purina had signed the license and that Donkey Kong was going to be on television as a cartoon series, this kind of thing.

Q. Let me show you what is in evidence as Defendant's Exhibit 60, which is a letter from Manton Cork to Nintendo of America dated January 30, 1984, Mr. Lincoln. Did you see that letter at or about the time?

A. Yes.

Q. It was received by Nintendo? Would you please read that to us.

A. The letter is addressed to Susan Schoenecker, licensing manager. "Ms. Schoenecker, thank you for your letter of January 16. We are not interested in renewing the contract because our program was killed as a result of Universal lawsuit and threats against us. As a consequence of those threats, all merchandise was frozen and discontinued. A report covering the activity is attached.

This has been a horrible and costly experience for us. Sincerely, Audrey Columbo."

Q. Mr. Lincoln, does Manton Cork still owe royalties under the provision of the license agreement?

A. Yes.

Q. How much does it owe?

A. $10,000.

Q. Has it refused to pay that amount?

A. Yes.

Q. Are you familiar with the company called Silva?

A. Yes.

Q. Was Silva a Nintendo licensee on January 3, 1983?

A. Yes, they were.

Q. What products did Silva manufacture under its license agreement with Nintendo?

A. To make a Donkey Kong blanket sleeper.

Q. Had Silva as of January 3, 1983 produced any product?

A. They hadn't produced any product, but they had provided Nintendo with product samples and we had given some approval -- Susan Schoenecker had given some approval to the product sample.

Q. Did Silva ever remit any royalties to Nintendo?

A. No.

Q. What is the balance owed under the guaranteed --

A. Well, that's not true, they paid the $5,000 advance, but there were no other royalties paid, and they owe us $45,000, which is the balance of the guaranteed royalty.

Q. Did they ever to your knowledge produce any products under the license, other than the prototype?

A. Not to my knowledge.

Q. Mr. Lincoln, Ralston Purina is a Nintendo licensee; is that correct?

A. That's correct.

Q. When did it become a licensee?

A. That would have been March of 1983.

Q. Does it continue to be a licensee today?

A. Yes.

Q. How much in royalties has Ralston Purina paid to Nintendo?

A. Approximately $1,375,000.

Q. Is that for the sale of any particular product or products?

A. Donkey Kong and Donkey Kong Jr. cereal.

Q. What was the period during which this license agreement was negotiated?

A. February, March of 1983.

Q. What was the royalty percentage contained in that license?

A. Three percent.

Q. Is that the standard royalty for a food product license?

A. No, that's the bottom end, as I understand it.

Q. And what is a standard royalty range for a food product license?

A. Three to six percent, in that area.

Q. Did you inform Ralston Purina of the litigation with Universal during the negotiations over the license?

A. I did.

Q. Was that Nintendo's policy with respect to potential licensees after the lawsuit was filed?

A. Yes.

Q. Were you ever informed Ralston Purina had any contact with Universal while negotiating with Nintendo?

A. Yes.

Q. To your knowledge, did Ralston Purina ever enter into an agreement with Universal similar to the Coleco agreement?

A. Not to my knowledge.

Q. To your knowledge, was execution of such an agreement requested by Universal?

A. Yes.

Q. Did Ralston Purina ever inform you why it did not enter into an agreement with Universal?

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A. Yes.

Q. What did they tell you?

A. They indicated that through their own in-house trademark attorney and through outside counsel that they had reviewed all of the pleadings in this case and had done quite a bit of research and homework, and that they had concluded that Universal did not have any rights in King Kong and that essentially we were going to win.

Q. You testified that in the month immediately after the institution of the litigation that you were informed that Atari had been asked to sign an agreement like Coleco's with Universal, and I believe you testified that Atari told you that it would not do so; is that correct?

A. That's absolutely correct.

Q. Did there ever come a time when you learned that Atari had in fact entered into an agreement with Universal?

A. Yes.

Q. When did that come to your attention?

A. I found out about it during this discovery in this case.

Q. Was that sometime during 1983?

A. My recollection is that at Toy Fair, which would have been February of '83, Mr. Arakawa and I had a breakfast meeting with Skip Paul, where he indicated that

Atari was getting pressured to sign an agreement or enter into an agreement similar to the Coleco agreement but that Atari was resisting the pressure. I subsequently learned that he had signed the license agreement with Universal a month before our breakfast meeting.

Q. Did you ever receive information from Atari as to why they had entered into an agreement despite what you have just testified to?

A. Yes.

Q. And what did they tell you?

A. They indicated that Universal had exerted pressure on them through their parent company, Warner Communications. I was advised by -- I was advised of that by Skip Paul.

Q. Now, you also testified that Universal had contacted Milton Bradley during the months immediately after the litigation was filed. Was Milton Bradley a major licensee?

A. Yes.

Q. Of Nintendo?

A. Yes.

Q. Could you tell me how much in royalties Milton Bradley has paid Nintendo?

A. About $300,000.

Q. Did Milton Bradley ever inform you that

Universal had been in contact with them again after the contact as to which you had previously testified?

A. Yes.

Q. How did that come to your attention?

A. I received a phone call from Mel Taft indicating Bradley's in-house attorney, Bruce Oravec, had received a letter from Mr. Fairhurst.

Q. Did Mr. Taft send a copy of that letter to you?

A. Yes.

Q. Showing you what is Defendant's Exhibit 54 in evidence, and ask you if that letter from Mr. Fairhurst to Mr. Oravec dated March 30, 1983 is the letter as to which you have just testified?

A. Yes, it is.

MR. KIRBY: Your Honor, I will not ask the witness to read this letter. It is Defendant's Exhibit 54 in evidence.

Q. Did Mr. Taft tell you what what Milton Bradley's intentions were with respect to the Universal demand contained in that letter?

A. My recollection is that he indicated that -- that they were not going to do -- enter into any kind of agreement with Universal.

Q. Now, you have also testified about negotiations with Ruby Spears. Did Ruby Spears become a licensee of

Nintendo?

A. Yes.

Q. And I believe you testified that they produced a Donkey Kong cartoon series under license with Nintendo; is that correct?

A. That's correct.

Q. Did Ruby Spears enter into an agreement with Universal similar to the Universal-Coleco agreement?

A. They entered into an agreement with Universal, yes.

Q. Do you know when they entered into the agreement?

A. My understanding was it was in March of 1983.

Q. Were you advised why Ruby Spears entered into a Coleco-type agreement with Universal?

A. Yes.

Q. What were you told?

A. I was told that there was no way that Ruby Spears was -- or that CBS was going to allow Donkey Kong cartoon series to be aired in the fall of 1983 without arrangements being made between Ruby Spears and Universal.

Q. Now, Mr. Lincoln, you have testified about seven Nintendo licensees who refused to proceed with their Nintendo licenses after January '83. To your knowledge, has any other Nintendo licensee absolutely refused to proceed with with its license, citing the Universal lawsuit

tried to reassure them. We said, "We would give you an indemnification, this is a hot property, keep trying to sell it." That was basically it. We just kept getting phone calls over the course of '82 and even into '83 from concerned licensees.

Q. Now, Mr. Lincoln, can you tell me overall what Nintendo's revenues have been from its royalties from product licensees such as the type you have been testifying about today?

A. The merchandise licenses are -- the product licenses exclusive of Ralston Purina, the total royalties to date are just a little bit over $1 million.

Q. Does that include Milton Bradley?

A. Yes.

Q. And you said Milton Bradley paid about how much?

A. $300,000.

Q. So exclusive of Milton Bradley, about $700,000; is that correct?

A. That's correct.

Q. And including -- to make sure we have these figures correct -- including Milton Bradley and Ralston Purina, what would the total revenues be?

A. No -- all right. In addition to the $1 million that I just mentioned, you've got $1,350,000 being paid by Ralston Purina. So the total royalties to date exclusive

of Coleco and Atari come to $2.3 million.

Q. In terms of video arcade game product licensing, was this a successful licensing program?

A. This was not a successful licensing program, given the enormous popularity of Donkey Kong and the popularity of video games, and in particular, Donkey Kong and Pac Man, in this period of time, '82. I concluded that it was -- or I considered that, and I think Mr. Arakawa feels the same way, that it was a disaster.

Q. How did the merchandising revenues of Donkey Kong from these product licenses of two point three-fifty, I have it, compare with the license revenues of any other video game manufacturer?

A. Pac Man's merchandise licensing revenues were about $19 million, and 60 percent of that was made in 1982.

Q. And I believe you testified previously that Pac Man was the only video arcade game more successful than Donkey Kong?

A. Yes.

Q. In terms of video arcade game sales, can you compare the two?

A. Donkey Kong sold about 60,000 uprights and tables, Pac Man about 100,000 units.

Q. Now, Mr. Lincoln, at various points in your testimony you have said that your licensees referred to a

problem of sell in to retailers. What does "sell in" mean?

A. My understanding is -- and I didn't learn this in law school, I learned it from listening to the people in the marketing department at Nintendo -- sell in is the term that they use referring to the manufacturer selling its product in to the retailer as opposed to the retailer's sale to the ultimate consumer which is called sell through.

Obviously, with these licenses, royalty licenses, the sell in is what's the key because we get -- we get the royalty based upon the sale of the sell in. The problem that we were experiencing in this whole period of time was a sell in problem, or that's not the problem we were experiencing, it was the problem our licensees were experiencing.

Q. Now, Mr. Lincoln, do you have any basis for quantifying how much the refusal of retailers to stock Nintendo products, a sell in product because of this lawsuit, has damaged Nintendo?

A. No, there is just no way to tell.

Q. Can you quantify the overall damage done to your licensing program done by this lawsuit?

A. No, I can't.

Q. Did Coleco's entry into a license with Universal have any impact on the Nintendo's licensing program?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. Certainly.

Q. Would you testify as to what that impact was.

A. Coleco, for better or worse, was the major license. The home video business was booming, and it was -- that's the license that exposed Donkey Kong to the population at large. Obviously the arcade game did that, too, but Coleco got Donkey Kong into the homes. So they were the key licensee, they were the flagship. They were the license that we were counting on to perpetuate the merchandise licensing program. And so there was in effect --

Q. Now, you testified that Universal entered into agreements with, in addition to Coleco, Atari and Ruby Spears. Were you ever informed by any of these three licensees that they had to change their products because of some demand by Universal?

A. No.

Q. To your knowledge, did any of these licensees ever submit product samples to Universal?

A. Not to my knowledge.

Q. Did Universal to your knowledge have any control over Donkey Kong products marketed by these licensees?

A. No.

Q. To your knowledge, did Universal intervene in

any way with the marketing of Donkey Kong by these licensees?

A. No.

Q. Now, Mr. Lincoln, I failed to ask you, prior to the time that you became general counsel and executive vice-president of Nintendo, did you hold any position at Nintendo?

A. I was secretary of the corporation from February 1982.

Q. Now, Mr. Lincoln, is Donkey Kong or Donkey Kong games still -- arcade games still in the marketplace?

A. Yes. They are still out there. Our estimate -- we sold about 60,000 Donkey Kong's and about 30,000 Donkey Kong Jr.'s. So our estimate right now is that there is probably about 75,000 Donkey Kong games out there. When I say our estimate, that's the estimate of our coin-op sales people and Mr. Arakawa.

Q. Now, Mr. Lincoln, I take it you incurred attorneys' fees in connection with defense of this action by Universal against Nintendo?

A. Yes, we did.

Q. Can you give me in some round number what the attorneys' fees are that you have incurred in defense against the Universal lawsuit?

A. Up to October 4th, which was when the Court of

Appeals -- I cut it off at this point when the Court of Appeals issued its ruling -- the total fees we paid were $1,142,545.70, plus $228,752.68 in costs.

Q. Mr. Lincoln, since that time, I take it you have continued to incur attorneys' fees in connection with these counterclaims?

A. Sure.

Q. And in in connection with the prosecution of the counterclaim for copyright infringement?

A. Yes.

Q. Are you able to tell the court now what those fees are?

A. For the prosecution of the copyright?

Q. Yes.

A. No, all of the fees are not in.

Q. Mr. Lincoln, just one final question. Has Universal contributed anything to Donkey Kong's success?

A. I would say that Universal has hurt Donkey Kong.

MR. KIRBY: Your Honor, before extending Mr. Lincoln to Mr. Fairhurst, I would like to call your Honor's attention to Defendant's Exhibit 21 in evidence which is a memorandum from Stanley Newman, a senior officer of MCA, who the evidence will show is in charge of merchandising, addressed Bob Hadl and Mr. Sheinberg.

This brief memorandum reads: "While making the

began in April of 1982 and continued on through April of 1983, approximately, a little after that, the bulk of it?

A. Yes.

Q. You had 40 to 50 licensees during the course of this time?

A. Up to the time of the lawsuit.

Q. Was there of a time, Mr. Lincoln, that you had about a hundred licensees?

A. I think the -- I added them up the other day, Mr. Fairhurst. I think they come up to about 65 if you count all the licenses.

Q. Of the 65 licensees that Nintendo had during the course of its whole program with the Donkey Kong property, you have identified seven and I think your testimony what is that these are the ones that you clearly identify as having told you that the reason they were giving up their Donkey Kong license was because of the Universal claims on King Kong of which they had been apprised by virtue of a letter principally from me; is that correct?

A. That's correct.

Q. I ask you a very general question at the outset: When you received these letters and this correspondence to which you have testified about the licenses, were you skeptical about their reasons in the case of any of the seven as to why they were giving it up?

A. Was I skeptical about it?

Q. Yes. Did you accept their version of why they were giving it up?

A. I certainly did.

Q. In every case?

A. In every case. I had no reason to doubt their word. Obviously, we had received a number of letters that were all saying the same thing. Frankly, I was more concerned with the comments in these letters about the sell-in. I had hopes that we would be able to convince some of these people to keep going.

Q. Let's just start with Silver Manufacturing Company. Remember that's the company that wrote you and said they were not going to continue with their license for blanket sleepers?

A. Blanket sleepers.

Q. Okay. That license was entered into in November of 1982?

A. The document was, yes, was signed in 1982, November of 1982.

Q. Now, this was five months, November of 1982, after the lawsuit had been commenced, was it not?

A. Yes.

Q. Now, at that point had they manufactured any of those products?

A. We had been dealing with them.

Q. Can you answer my question yes or no on that one?

A. They had not manufactured any products.

Q. In point of fact they never once made a Donkey Kong sleeper, did they, whatever it is?

A. They certainly provided us with the art work.

Q. I know they gave you the art work. You said that before. They never manufactured them, did they?

A. Their letter indicates that they had progressed to the point of ordering up and producing something like 24,000. You've got the letter.

Q. I can cut through this very quickly, Mr. Lincoln.

In fact, didn't you write them on May 10, 1984, and tell them that you were through with them at that point, you were the one who was canceling the license on the basis that they were in breach of contract because they had never made the product?

A. We certainly did write them a letter in that period of time, through our attorneys, indicating that we were seeking to collect the guarantee. That's absolutely correct.

Q. You charged Silver with bad faith?

A. That was our attorney's comment.

Q. Which you don't wish to adopt at this point?

A. Which I don't wish to adopt at this point.

Q. Fair enough. I understand.

There was a statement made in one of those letters to Silver to the effect that hundreds of licensees continue to sell Donkey Kong products.

Was that also a statement that might, if you pardon me, be a little bit of hyperbole at that point?

A. I think the statement was consistent with what we have been doing. Maybe she went a little bit too far in talking about hundreds of licenses. Her point was, and it was a point that I had been trying to make to these licensees, that hey, this program still has life to it and that was the point she was making.

Q. To sum up on Silver, they never manufactured a Donkey Kong product. The license was granted in November of 1982, seven months after the lawsuit was already in existence and you wound up writing to them claiming that they were in breach because they never made the product and you had problems with them all along; isn't that so?

A. I think the correct answer is that they advised us in September of 1984 that they were not going -- they had decided not to produce the goods because of the lawsuit.

Q. Let's go on to Trim Line Sales. They paid $5,000 as a guarantee against royalities. Did you ever receive another payment from them?

A. Not that I recall.

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Q. And that was a license that was also entered into prior to the institution of this lawsuit, April 29, 1982?

A. That's correct.

Q. Like a lot of those licenses?

A. There were a number of them.

Q. When you said before that they still owe you $10,000, what you mean to say is they owe you the $10,000 additional guaranteed royalty. They had that guaranteed royalty of 15,000, they paid 5 when they signed the agreement and you never saw another nickel?

A. That is right.

Q. As far as you know you they never made any Donkey Kong belts?

A. Yes.

Q. The license was granted in April 1982, I wrote them, Douglas Fairhurst, in January of 1983 and in that period of approximately 10 months, 9 months, they did not make a single Donkey Kong belt.

They paid you $5,000 in royalities and that was the end of the deal?

A. That's correct.

Q. Bates Knitwear, another of the famous 7, they were licensed to sell girls sleepwear with the Donkey Kong on it, correct?

A. That's correct.

Q. And their license was granted in April 1982 as well?

A. Yes, sir.

Q. And it was supposed to expire in December of 1983?

A. Yes.

Q. Now, as I understand it, they generated approximately $12,000 in revenues during the period of time in which they were selling this product; is that right?

A. I believe that's correct. They exceeded their guarantee.

Q. Now, when you wrote them or when your lawyers did, more correctly, saying you've got this letter from Universal's lawyers, don't worry about it, we are defending the claim vigorously, the claims are meritless and we expect to prevail and so forth, when you wrote them that letter they came back with a letter, didn't they?

A. Yes.

Q. What was their first letter back; do you remember what they said?

A. My recollection is that they wrote us. We wrote a letter through our attorneys and Bates wrote back to me.

Q. And they said that they were concerned but wanted to see a financial statement, didn't they?

A. Yes, they did.

Q. To make a long story short, you refused to give them a financial statement, didn't you?

A. I gave them pertinent financial information.

Q. I know that. But you refused to give them what they wanted, correct?

A. I refused to give them a financial statement of Nintendo of America.

Q. At that point they said, forget it, if you won't give us a financial statement we won't go forward with the license?

A. They didn't say that to me. They asked us to provide a financial statement. We advised them of pertinent financial information and they -- and we also urged them, I also urged them, to continue on with the license.

Q. They declined to do so because you wouldn't give them a financial statement; they said an indemnity wasn't good enough?

A. I don't believe we received any more letters from them.

Q. They wrote to you on February 1. You wrote back to them, did you not; do you have that in front of you?

A. I did respond to this letter.

Q. That's what I am getting at.

A. Yes, I did.

MR. KIRBY: Is that marked for identification?

MR. FAIRHURST: Yes, that's Defendant's Exhibit 47.

Q. And your letter was to Mr. Dickerson on February 22, 1983, and you declined in that letter to send them the financial statement that they asked for, didn't you?

A. I advised them of our financial condition and I refused -- I told them that we do not provide that kind -- those financial statements and I gave them the name and phone number of our CPA at Coopers & Lybrand and suggested that they could talk to them if they had any questions.

Q. As of June 1982, Nintendo had an agreement with Ruby Spears; that is Exhibit 26?

A. That is not correct. The Ruby Spears agreement.

Q. Let me put in front of you a copy of the agreement, Mr. Lincoln. At the top it says as of June 25, 1982?

A. I know that it says that, Mr. Fairhurst.

Q. That's the date of the agreement as of the agreement?

A. That is not the date of the agreement. I don't know and I still don't know where this woman came up with this --

Q. I'm sorry. I can't hear what you are saying.

A. The license agreement with Ruby Spears was entered into in January of 1983. Harriet Beck, who is the attorney for Ruby Spears, had a way of dating these licenses as of this June 25, 1982. I am not -- I can't tell you why she did that. But I can tell you that we had no license with those people until January of 1983.

Q. Did you personally negotiate this license?

A. Mr. Arakawa and I both negotiated the license together and we also retained an attorney in California to assist us.

Q. And Ruby Spears subsequently went forward and developed the Donkey Kong cartoon series, did it not?

A. They did.

Q. That was broadcast on the CBS television network?

A. In September of 1983, yes, network series.

Q. Do I take it fairly that Nintendo has been paid every royalty owed onto it under this agreement by Ruby Spears?

A. Yes, that's correct.

Q. This agreement, if it's January of 83, it's serves the same point, whether it's after June it wouldn't make any difference. It was entered into and negotiated well after the lawsuit by Universal against Nintendo, correct?

A. Yes.

Q. Notwithstanding that -- look at paragraph 10 -- you gave no warrant, representation or indemnity of any kind with respect to the subject matter of Universal's claims over King Kong?

A. That's correct.

Q. If you look at paragraph 10 you left to Ruby Spears the defense and settlement of any claim against them, that was their sole responsibility, is that correct, paragraph 10, look at it.

A. Yes, that's correct.

Q. Now, I understand you to have made a statement in this litigation that it was your legal view, if you will, that because Ruby Spears subsequently signed a covenant not to sue with Universal Ruby Spears was in breach of this agreement; is that correct?

A. That's correct.

Q. So they were free, as you saw it, to defend the claim but they couldn't settle it?

A. Our position is very simple. Our position was that we had the exclusive right, title and interest in Donkey Kong and they would do nothing to impair it.

The fact of the matter is that they had to enter into an agreement with Universal. There was no other way in which that cartoon series was going to get on the air, none.

Q. You were notified by Ruby Spears of their willingness to go forward with this contract sometime before March 31, 1983, were you not?

A. They exercised their option, yes.

Q. That was exercisable as of March 1983?

A. I believe that's correct.

Q. They went ahead and they produced the program and the program was a success, wasn't it?

A. It was a success.

Q. Now, in that agreement, do you recall who owns the merchandising rights and the properties developed by Ruby Spears for the Donkey Kong television show?

A. Yes.

Q. Who owns them?

A. We do.

Q. Have you undertaken at this point to license any of those merchandising properties?

A. No, we have not. I believe, Mr. Fairhurst, that you are speaking about --

Q. Paragraph 10.

A. No, I don't think it's paragraph 10.

Q. I beg your pardon. The one preceding it.

A. 9. What I understood in our negotiations with these people was that they took the position that if they developed either new characters or if they enhanced the

value of our Donkey Kong character as a result of the cartoon series that they ought to get some kind of percentage of the extra belts and socks and T-shirts that were being sold. We said no. So we had that clause put in.

Q. You got the merchandising rights?

A. We kept them.

Q. That was a clause that you put in?

A. This was a clause that our attorney put in.

Q. He was familiar with the concept of merchandising rights, wasn't he?

A. I don't know what he was familiar with. I know what I was trying to get at and I was trying to keep these people from getting any percentage of the Donkey Kong royalities attributable to socks, T-shirts, mugs, et cetera.

Q. Now, was Ruby Spears granted ownership of the programs themselves? Let me refresh your recollection.

Look at paragraph 3.

A. It's a long paragraph.

Q. It's a very long paragraph. I am going do see if I can assist you. If I can take you down to the 12th line, starting with the words "Ruby Spears shall own in perpetuity."

A. Okay.

Q. "Ruby Spears shall own in perpetuity any and all television programs and/or feature films produced by it and

the characters, stories, teleplay, musical and literary material created by Ruby Spears and all distribution and exhibition rights and any program or film produced by it."

Do you see that?

A. Yes, I do.

Q. This agreement bears a signature of an authorized representative of Nintendo, does it not?

A. Yes, it does.

Q. Now, turn to the copyright clause, paragraph 7.

Tell us how the copyright was divided?

A. Copyright notice in the name of Nintendo.

Q. Not withstanding is that Ruby Spears shall be the sole owner of the products produced hereunder including but not limited to all programs and film negatives and any certificate of copyright registration shall reflect the existence of the agreement between us and our ownership of the produced product.

So Ruby Spears kept ownership of the film product itself, Nintendo has the merchandising rights in the underlying characters developed from it. Now, this was entered into before anyone had the benefit of Judge Sweet's thinking on this. Doesn't it strike you -- and this is argumentative and they can object if they want -- you split the rights, didn't you?

MR. KIRBY: We'll object, your Honor.

THE COURT: Overruled.

A. There's no question there was some division of the rights.

Q. Okay. There's no question pending to you.

A. All right.

Q. Has Nintendo taken any characters developed by Ruby Spears on that program?

A. No.

Q. Incidentally, when you testified on direct examination that these revenues from Coleco and Atari and from all these other licensees, we said 17.3 and you gave a figure of $2.3 million, excluding the Atari and Coleco and you said Nintendo. Were you including both Nintendo U.S. and Nintendo Japan?

A. Yes.

Q. I thought you were. I wanted to be absolutely certain of that.

Q. With respect to to any of these licensees, obviously, you have no claim against the two that didn't sign. The seven that you testified to on your direct examination of the 40 that you claim gave up a license because of something Universal did. Has Nintendo brought legal action against any of them?

A. Of those seven?

Q. Yes.

A. No.

Q. Just so we are clear on this: Nintendo takes the position in its briefs and so forth filed in this action that Coleco breached its agreement in some way.

Has Nintendo put Coleco on written notice of a breach of agreement?

A. There was no written notice.

Q. Has Nintendo sued Coleco?

A. No.

Q. Has Nintendo put Atari on written notice of breach?

A. Well, we are suing Atari.

Q. Not because of the Universal agreement. So, in other words, you have a lawsuit going with Atari over royalities because they have not paid you?

A. That's correct.

Q. You have not in that lawsuit made a claim against them because of this alleged breach you referred to?

A. That is correct.

Q. Is this this federal court?

A. In federal court in San Jose.

Q. You are the plaintiff, not the defendant, in the lawsuit?

A. We are suing on two licenses that they have breached.

Q. Let's turn to one of the other licensees that Mr. Kirby asked you some questions about. This is Houze of Glass. As I understand it, you have received a total of $5,582 dollars from this licensee and they were licensed in April 1982; is that correct?

A. Yes.

Q. 5,000. The first payment was the advance against royalities and I presume that the second payment of 582 dollars, which was in February of 1983 -- excuse me. That's not right -- August of 1982 was their actual sales above the 5,000?

A. That's right.

Q. Now, they were another company that I wrote to in January of 1982 and I am going to put in front of you Defendant Exhibit 28 and ask you if that's the sum and substance of your correspondence with that company.

A. That's correct.

Q. They simply said they didn't want to be bothered, in the substance of it, we have no knowledge of the particulars of the pending litigation, not in a position to assess its possible outcome or its impact on the proposed addendum and by the proposed addendum that was an indemnification you were then extending them?

A. Yes. They said, accordingly, we do not presently intend to continue to sell any of the designs

involved until we can be sure this matter is resolved.

Q. But the point is at that point they had returned in royalities approximately $582 above the guarantee; is that correct?

A. Absolutely.

Q. Turning to Milton Bradley, Mr. Kirby put some questions to you and I think he used the word contacted, Universal contacted them. Do you remember the questions and his choice of the words?

A. Yes.

Q. Universal contacted them.

Isn't it your understanding, in point of fact, Milton Bradley happened to have been at Universal on other matters entirely when this matter came up?

A. Yes. They were in Mr. Adler's office which is three floors down and in a different department from Mr. Hadl's.

Q. Universal didn't go out and contact them, they happened to be there and at that point they raised the question?

A. That's correct. Universal also contacted them in March of 1983 as well as January of 1983.

Q. As I understand it, the Milton Bradley people never negotiated any license with Universal?

A. That is correct.

obtained papers from the suit in California, which Universal had been involved in some seven or eight years before.

Q. Can you identify that California litigation any better, Mr. Forsman?

A. The California litigation was a suit captioned Universal City Studios versus RKO General and others.

Q. Do you know what that lawsuit involved?

A. That suit was, from the papers I reviewed, a declaratory judgment action which sought to -- it sought a declaratory judgment that Universal had the right to make a King Kong movie, a subsequent King Kong movie.

Q. And did you conduct any other investigation Mr. Forsman?

A. I got a search from the U.S. Patent and Trademark Office and when I found out about the lawsuit I got a search of King Kong marks from the U.S. Patent and Trademark Office and I had a law firm in Washington also do a search in the records of the copyright office to see who owned King Kong.

Q. During the course of your investigation, Mr. Forsman, did it come to your attention or were you aware that various Nintendo licensees had been threatened by Universal?

A. Yes.

A. She said that I seemed to have more knowledge about it than she did but that she went on I think fortuitously to say that Universal had a pretty bad reputation out on coast as being very litigious and that despite the fact that she didn't believe they had any rights they were going to enter into a license with Universal because Universal had that lot of power out in this town is the way she put it.

Q. As a result of your investigation, Mr. Forsman, did you come to any conclusion with respect to the Universal's claims?

MR. FAIRHURST: I object to that.

THE COURT: Overruled.

A. I was convinced in my own mind that they did not have rights sufficient to preclude our introduction of a Donkey Kong cereal.

Q. And--

A But that was a tentative conclusion.

Q. Did you take any other steps to firm up this tentative conclusion, Mr. Forsman?

A. Yes. We arranged for a meeting with Universal City Studios. Have in mind by now we had gotten most of our information from, as far as the suit was concerned, Nintendo's side and we wanted to see if there was something to be said from the other side.

Q. Do you know when that meeting was set up or when was that meeting was set up?

A. On the 28th of February in 1983.

Q. Who attended that meeting on behalf of Ralston Purina?

A. There was a Mr. William Clagget who is an advertising division vice-president. There was a Mr. Stanley Rea, who was a division counsel, for the grocery products of Ralston Purina and there was a Mr. Gensamer who was a division vice-president in charge of grocery products marketing.

Q. And did you yourself attend that meeting?

A. Yes, I did.

Q. Who attended on behalf of Universal?

A. Mr. Stanley Newman, who I was led to believe was a vice-president at Universal and a Mr. Robert Hadl who I was told was a lawyer.

Q. Approximately, how long did this meeting last, Mr. Forsman?

A. About an hour.

Q. Can you tell us how the meeting commenced?

A. Well, the meeting commenced with Mr. Clagget's saying that we were -- our companies had had a good relationship and that we had done business before in that we had sponsored some television programs that they had

produced and that we were about to embark on a project of selling a product under the Donkey Kong name and we understood that there had been some litigation involving that and we wanted to see if we could resolve whatever differences or head off wnatever differences we might have amicably.

Q. Did you advise Mr. Hadl and Mr. Newman about the conclusions you had reached as a result of your independent investigation of their claims?

A. Yes, I did.

Q. Do you recall whether Mr. Hadl or Mr. Newman responded?

A. Well, I told Mr. Newman -- I was looking more at Mr. Newman -- that I had done an investigation and from everything that I had learned they didn't seem to have any rights. But since I had only heard one of the story I was going to give them an opportunity to give me their side of the story.

Q. Do you recall whether they responded?

A. Mr. Newman said that he had indicated before we had the meeting that he didn't want to talk about the lawsuit. I believe that about that time he said if you came out here to talk about that you have wasted your time.

Q. Did you press your inquiry as to the rights they were claiming?

A. Yes. I pressed my inquiry to the point of obvious agitation. I constantly pressed the matter. I characterized the suit in California as a suit that they had won and now they turned on its head and were taking the position that what they had argued they didn't have they now had and I thought it was extraordinary and maybe they could tell me they had something more. But from what I had seen they didn't have anything.

Mr. Newman at that time was resisting and telling me he didn't want to talk to me about it.

Q. Do you recall any specific comments he told you?

A. Well, he said if you want to know what our position is on the suit read the pleadings and talk to Mr. Fairhurst.

Q. Was Mr. Sheinberg mentioned during this discussion?

A. Yes, he was.

Q. In what connection?

A. I was denegrating their legal position. Mr. Newman mad a comment about Mr. Sheinberg, a lot of people didn't think Mr. Sheinberg could pull off the Sony Betamax case which they had by that time won and that a lot of people had thought that he couldn't, you know, that -- the implication was that he had taken some longshots and had won on them and the tenor and implication of all the

conversation was if you don't deal with us we'll do a job on you too.

Q. Did they tell you that Mr. Sheinberg was a lawyer?

A. Yes.

Q. Was Coleco mentioned during this discussion?

A. Coleco and Atari were mentioned. Newman indicated that there had been a -- they had deals with Coleco and Atari and they were on the verge of having to deal with somebody else. We got into a discussion about what kind of deal we might be able to work out with them and it seemed to me from the tenor of the conversation that if we entered into a deal similar to Coleco's we would be okay.

Q. Did Universal state anything about a claim of right in Donkey Kong?

A. Mr. Newman had one point. I said, look, maybe we can approach this thing on the basis if you think you have a case and I think you don't and maybe we can do it on the basis of we will pay you a license royalty until you lose the case and then you pay us back or if you win the case you keep the money. The answer was, oh, well, we are not interested in that and if we win the case we'll own Donkey Kong.

Q. Did the subject of a possible King Kong come up

at all in the discussion?

A. At one point Mr. Gensamer had asked Mr. Newman whether or not Universal would be willing to grant a King Kong license.

Q. Was there a response?

A. The response was you mean Donkey Kong. Gensamer said, no, I mean King Kong. Newman said, come on, nobody wants King Kong.

Q. Did there come a time in the meeting when Ralston proposed an agreement to settle the matter?

A. Yes, at one point Mr. Rea handed Mr. Newman a document that we had prepared prior to the trip.

Q. Mr. Forsman, I'll show you Defendant's Exhibit 37 in evidence and ask you do you recognize that.

A. Yes, I do.

Q. Is this the proposed agreement that was given to Universal at that meeting?

A. This is a copy of that agreement with some notations that I think were not on it originally.

Q. Who was given this agreement from Universal?

A. I believe Mr. Rea gave it to Mr. Newman.

Q. Did Mr. Newman review this agreement?

A. Yes, he did.

Q. Did Mr. Newman comment on it?

A. He read down until he got to the consideration,

which was $1 and he kind of snickered and made some comment about, you know, you have to be kidding. One dollar, what do you mean one dollar.

Q. Did he express any further interest in this arrangement?

A. He read beyond that where it said other good and valuable consideration and we started discussing what that might be.

Q. Did you discuss with him the factors which would influence the determination of the amount of that other good consideration?

A. All the while I was discussing whether or not he had something to sell us and whether or not, you know, there was anything of value. There was some discussion of this. There was certain nuisance suit value in the thing and we might be prepared to pay some small amount. Our preference would be to pay a lump sum rather than in effect a royalty.

Q. What was the discussion, if any, about a continuing royalty as opposed to a lump sum payment?

A. Well, they were really against the lump sum idea. But they, you know, they would entertain -- I think this may have been the point where they decided well, we'll go talk to Mr. Sheinberg and see what he thinks about it.

Q. Before we get to the discussion with Mr.

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Sheinberg, I believe you testified that Coleco and Atari were mentioned during this discussion; is that correct?

A. Yes.

Q. Did they tell you that Coleco and Atari had entered into licenses?

A. They said Coleco and Atari had entered into agreements that provided percentage royalities and that's the kind of thing they were looking at.

They also said, when I said, you know, that you don't have a case, they said, well, you must be a lot smarter than those guys because they thought we had a case enough to enter into these agreements with us.

Q. Now, Mr. Forsman, did there come a time during the meeting when Mr. Newman and Mr. Hadl left the room?

A. Yes.

Q. Did they tell you why?

A. Well, I think -- and my recollection is not perfect, because it's been a long time. I think they went up to discuss the various business deals that could get us out of this situation and I think they were primarily discussing whether we would go with the straight royalty. I have no knowledge, of course, of what they discussed other than what I have read in depositions in this case.

Q. Did they tell you that they were going to have this discussion with Mr. Sheinberg?

A. Yes.

Q. For how long were they gone?

A. Probably 15 or 20 minutes.

Q. Did they both return together?

A. I believe they did, yes.

Q. When they returned, how long did the meeting last after that?

A. Not very long, probably 10 minutes, five or ten minutes.

Q. Was, at that point, the subject of a continuing royalty versus a lump sum payment discussed further?

A. I believe they said that Mr. Sheinberg was not interested in a straight lump sum royalty. The whole topic didn't really die at that point. There was some discussion about a further meeting or further discussions. We were running out of time. Apparently, Mr. Newman had an appointment he had to go to.

Q. Did he advise you that he had this other appointment when he returned from his meeting whether Mr. Sheinberg?

A. It was after he returned from the meeting. I don't know if it was directly after.

Q. Do you recall anything else about the substance of the discussion after they returned from their meeting with Mr. Sheinberg?

A. There were a lot of discussions. There were business discussions going on and I was still talking about the legal rights and Mr. Hadl and Mr. Rea got into a discussion about the legal rights and I kind of chimed into that discussion.

Q. Do you recall any specific comments Mr. Hadl made?

A. Mr. Hadl said, in substance, that they would sue us if we went on and marketed Donkey Kong without entering into a deal with them and that they would not be as lenient with us as they might be on other people because we knew better. We were, in effect, wilful infringers and is that they would seek a preliminary injunction and --

Q. Excuse me.

A. Yes.

Q. After the meeting concluded did you and Mr. Gensamer and Mr. Clagget and Mr. Rea have occasion to discuss what had transpired?

A. Yes.

Q. Did you come to a conclusion as to what Univesal's intentions were at that point?

A. Yes.

Q. What did you believe that to be?

A. My conclusion was that they would sue us if we didn't enter into an arrangement with them.

that marketing commence?

A. It commenced in April of 1983.

Q. In Ralston Purina's view, was marketing of Donkey Kong cereal a substantial success?

A. It was a substantial success for the kind of product it was.

Q. What do you mean for the kind of product it was?

A. It's a licensed product and licensed products follow fads. So if you have a licensed cereal that does well for a year and a half or so you have done well with it and that's what this product did.

Q. Since the introduction of the Donkey Kong cereal in April 1983 has Ralston Purina heard anything further from Universal City Studios?

A. No.

Q. Mr. Forsman, did you prepare a written statement for submission to the court in connection with this action?

A. Yes.

Q. Did you swear to the contents of that statement?

A. Yes.

Q. Mr. Forsman, I'll show you what has been marked and it is marked I believe now as Defendant's Exhibit 101 for identification and ask you if that's your statement?

A. Yes, it is.

Q. Do you still swear to the contents of this

statement?

A. Yes, I do.

MR. GALLATIN: Your Honor, I offer defendants' Exhibit 101 for identification into evidence.

THE COURT: Admitted.

(Defendant's Exhibit 101 for identification was received in evidence)

MR. GALLATIN: Mr. Fairhurst.

MR. FAIRHURST: Over objection.

CROSS-EXAMINATION

BY MR. FAIRHURST:

Q. Mr. Forsman, did I understand you to say that you had read the deposition testimony of Mr. Hadl or Sheinberg or both?

A. I read the deposition -- the portion of the deposition testimony that referred to the meeting in Mr. Sheinberg's office.

Q. That's where you got the information to which you have just testified; is that correct?

A. No, it's not.

Q. What was the occasion--

A The information that I got -- I didn't testify as to what was said in that deposition. I will be happy to tell you what I read.

Q. No. I think the deposition speaks for itself.

Nintendo -- the position they had taken in the litigation, did you not?

A. Yes, I did.

Q. You asked for that?

A. Why yes, I did.

Q. And I assume you also wanted to know what arguments they were going to making on various points?

A. Yes.

Q. And at the told you?

A. Yes, they did.

Q. Would it be fair to say, so we don't have to go through the whole thing, as far as you could determine, you got a fairly good and substantial briefing on Nintendo's position in the lawsuit as it was then in February of 1983?

A. I got that and more.

Q. And more. You were aware, were you not, that Nintendo was then in the process of preparing a motion for a summary judgment; is that correct?

A. I was told that, yes.

Q. You knew what arguments they were going to making, you knew everything about their case except you did not know it as well as Mr. Kirby and his colleagues; you knew what their position was in spades?

A. They were not holding back anything from me.

Q. Absolutely. They gave the full, full story?

A. Absolutely.

Q. Every single thing you wanted?

A. They did.

Q. You did what you should do, you did your own independent search by going through the files in the copyright office and trademark office?

A. Yes, I did.

Q. You have this reservoir of knowledge and you call Universal up, call them up, and say I would like to hear your side of story?

A. Somebody else in the company called them up.

Q. They said, sure, come on out and talk to us, correct?

A. Yes.

Q. You ended up up there?

A. Yes.

Q. There were four of you, two lawyers, yourself and Mr. Rea?

A. Yes.

Q. Two division vice-presidents of Ralston Purina?

A. Yes.

Q. The four of you went rushing in and went to see Mr. Stanley Newman and Mr. Robert Hadl?

A. Yes.

Q. As I understand your direct testimony, you

MR. FAIRHURST: I wanted to establish that he was familiar with the concept than his own client, Ralston Purina had a successful case or was in the process of winning one?

A. I was the attorney in the chase.

Q. I appreciate you were. I wouldn't ask the question if I didn't think you were.

Notwithstanding your conclusions and all of this about Universal's position and Donkey Kong with an infringement, you went ahead with a product in the market, you wound up offering $100,000?

A. Yes.

Q. Or a royalty, one way or the other?

A. Right.

Q. As I understand it, you said that was, in your judgment, a commercial consideration based on not having to worry about putting executives up for deposition and you were also concerned about a preliminary injunction?

A. Well, yes. We were afraid of the effect on the trade of a preliminary injunction. We were afraid of the disruption of the selling with a preliminary injunction. We certainly didn't want a lawsuit right at the time we were introducing a product.

Q. At that point you knew, did you not, that Universal's lawsuit had been brought in June 1982 and here

we are all way around and we are talking about events now in February and March of 1983, and Universal had never applied for a preliminary injunction and there was no threat that Universal would apply for one?

A. Mr. Hadl had suggested they would against us. Mr. Hadl had suggested as we were walking out of the meeting that they would seek preliminary relief against under the circumstances.

Q. Do you recall what the guaranteed royalty payable to Nintendo under your agreement was, the guaranteed royalty?

A. I believe it was $100,000.

Q. Over what period, what's the term?

A. The term was five years and it's $100,000.

Q. For the five year period?

A. Yes.

Q. You were offering Universal $100,000 for a covenant not to sue in essence and that was your document?

A. Excuse me. I misunderstood the question. I thought you were talking about the Donkey Kong agreement.

Q. $100,000 guaranteed royalty over five years?

A. Yes, that's right.

Q. You were offering Universal back in March 1983 $100,000 to settle a claim?

A. Yes.

Q. If they would have taken it on a lump sum basis?

A. Yes.

Q. You are offering Universal $100,000, whereas for five years that would have been the minimum royalty to Nintendo?

It's a fact, isn't it?

A. It's a fact. There's a reason for the fact.

Q. At some point before you went to visit Universal -- and I believe the meeting was on February 28, 1983; is that correct?

A. Yes.

Q. At some point before that visit, did you advise Nintendo or its lawyers that you were going to be making that visit to Universal?

A. Yes, we did.

Q. When you came back, as it were, from that meeting, did you report back to Nintendo's lawyers the sum and substance of what had occurred?

A. I believe we did.

Q. Did you tell Nintendo's lawyers that you went to the meeting with covenant not to sue agreement in hand?

A. I can't remember. There would not have been any reason not to tell them.

Q. Was it your understanding that your covenant not to sue was to be the settlement of a potential claim by

lawsuit. That's all we were thinking about.

MR. FAIRHURST: No further questions.

THE COURT: Redirect

REDIRECT EXAMINATION

BY MR. GALLATIN:

Q. Mr. Forsman, Mr. Fairhurst asked you about when you had seen Mr. Sheinberg's deposition?

A. Yes.

Q. You told him I believe you saw it just yesterday?

A. I saw it yesterday.

Q. Do you recall that before you prepared your sworn statement that has been submitted to the court in this case that I came down to see you in St. Louis?

A. Yes.

Q. Do you recall my showing you part of Mr. Sheinberg's deposition that reads as follows:

"Q. Are you aware of any discussions between Universal and Ralston Purina with respect to Donkey Kong?

"A. Yes.

"Q. Tell me what you were aware of.

"A. A couple of my associates, namely Mr. Newman and Mr. Hadl, advised me that three or four lawyers in Ralston Purina came to visit us looking for what amounted to a covenant not to sue and they related to me that these people were prepared to make a modest flat sum

payment in exchange for a general covenant not to sue for a product which was not disclosed and the meeting lasted 20 seconds. I said that is the most stupid thing I every heard of. Throw them out of the building I don't want to hear about it any more and that was the end of that conversation."

Do you recall my showing you that part of Mr. Sheinberg's deposition?

A. Yes, I do. I believe that's the same part that I saw in Mr. Kirby's office yesterday as well.

MR. GALLATIN: Thank you, Mr. Forsman.

THE COURT: Thank you, sir.

(Witness excused)

THE COURT: Tomorrow morning at 9:30. Thank you all.

(Adjourned to 9:30, May 21, 1985)

SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

UNIVERSAL CITY STUDIOS, INC.,

v.

NINTENDO CO., LTD

82 Civ. 4259 RWS

May 21, 1985

9:40 a.m.

(Trial resumed)

HOWARD LINCOLN resumed.

CROSS-EXAMINATION

BY MR. FAIRHURST: (CONT'G)

Q. Mr. Lincoln, before we broke up yesterday afternoon I had put to you two questions about revenues derived by Nintendo, speaking of both the Japanese and the American company, from the licensing of Donkey Kong products and you remember we talked about how much money was derived from it and I came up with a figure of $17.2 million which I believe you said was accurate but you had some question whether it might include Donkey Kong Jr. revenues; do you recall that in substance?

A. Yes.

Q. Now, you are aware, are you not, that during the course of this litigation Nintendo has given responses to interrogatories put to it by Universal?

A. Certainly.

Q. You participated in the approval and review of those, did you not?

Q. All right. Do you recall whether Nintendo ever put out a press release saying of Donkey Kong that it quickly achieved popularity in the arcades and became a lucrative licensing property in the United States of companies like Coleco and Atari?

A. I am sure we did.

Q. Do you know that you made that statement as late as October 10, 1984?

A. I would still make it today if it would sell any product.

Q. I'm going to go back to a few -- we'll get off the subject -- of the seven licensees that you were referring to yesterday as having breached their contracts in some way with Nintendo as a consequence of the Universal lawsuit and you will remember that one of of them was a company called Super Shirts. As I understand it, you have not sued Super Shirts; correct?

A. That's correct.

Q. Do you know whether the company exists today?

A. I have no way of knowing. I believe that the company is located in the Washington area. I assume that it does.

Q. Are you aware that they are in bankruptcy?

A. No, I was not. I can say if they are in bankruptcy, we didn't get a filing. We didn't get notice.

MR. FAIRHURST: Move too strike, your Honor.

Q. I am asking a simple question. You don't have to argue with me, Please.

A. I am sorry. I didn't mean to argue with you. The answer is I don't know.

Q. Do you recall writing to Mr. Bates of Super Shirts in February 1983 in response to his letter which was put in as Defendant's Exhibit 24. 24 was your letter. I'll put it in front of you.

A. This was a letter that they sent to me, Mr. Fairhurst.

Q. Sorry. I got it backwards. That's the letter they sent to you. I am going do put in front of you the letter that you sent to him.

Look at 24. In 24 they complained, in paragraph 3, I direct your attention: Second, we are extremely disturbed that we were not informed of the pending litigation before our licensing agreement became effective and we began marketing Donkey Kong products in July, referring to July 1982.

You wrote back to them, did you not, in February of 1983, and you said to them, for your information, we did advise and have continued to advise all prospective licensees of the lawsuit, because you had just advised them in January of the -- answered more properly -- the letter

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8 that I had sent, and as you know, Universal did not seek a preliminary injunction or otherwise notify any of our licensees of its suit at the outset of the litigation.

And that was the state of your knowledge February 3, 1983, was it not, that Universal had not notified a single one of your licensees, Nintendo's licensees, of any lawsuit?

A. No. That was not my state of mind. I was referring, Mr. Fairhurst,, to the fact that we had not, in this letter, when I wrote Mr. Bates at Super Shirts, I was referring to the fact that at the time of the litigation, when the lawsuit was filed we made a decision not to notify our existing licensees.

We did also make a decision that all prospective licensees would be notified.

The point that he was making to me was, hey, I was -- I felt into that prospective licensee category and I was simply saying, no, you didn't, because you had signed your license before the lawsuit was filed. In February of 1983 my state of mind was entirely different. I knew that you people had notified all of our licensees.

Q. I refer you again to the statement you made in February 3, 1983 to Mr. Bates. This is your letter, Mr. Lincoln, to Mr. Bates: As you know, Universal did not seek a preliminary injunction or otherwise notify any of our

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licensees of its suit at the outset of the litigation.

A. The letter says that and I will say again what I just testified to. I was concerned with pointing out to Mr. Bates that, hey, you didn't fall into a category where you signed a license after the litigation commenced. We hadn't told you anything.

Now, it's obvious that licensees were -- became aware very quickly of this lawsuit almost immediately after it was commenced.

It's also true that the letter, the specific letter to the licensees, went out in January of 1983. Between January of 1983 and going back to June 28 of 1982 licensees were being made aware of this lawsuit not only by the press release, not only by the filing but also by specific contacts that Universal was making to several of our key licensees, namely Milton Bradley and Atari, but I was dealing with a specific problem trying to get this man to understand we weren't trying to do anything that was improper.

Q. You are familiar with a licensee called Charleston Hoisery?

A. Yes, sir.

Q. That was another that you claimed backed out of a license after learning of Universal's litigation?

A. I didn't say or use the words backed out of the

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license.

Q. Cancelled?

A. I think I may --

Q. I am not trying to express a fine point with you?

A. Fine.

Q. What purpose did you cite them for? Did you not cite them for the proposition that they had refused to go forward if the license because of the Universal lawsuit; isn't that the substance?

A. You bet.

Q. Thank you.

Do you know how much money Charleston Hoisery paid Nintendo while the license existed?

A. They paid a $2,500. They didn't earn-out anything further.

Q. They were granted the license in April of 1982, correct?

A. Let me --

Q. Can't you answer that yes yes or no? April 1982 is all I am asking for.

A. Yes, they were granted a license in April of 1982.

Q. Had that license continued through the end it would have expired in December of 1983 by its terms, correct?

A. That's correct.

Q. During the period of that time, as far as you know, they paid $ 2,500 and they never submitted a single royalty statement to you?

A. They never earned out their royalty.

Q. Thank you.

A. For the precise reason that the man gave in the letter to us.

Q. I see.

A. Couldn't sell the stuff.

Q. You testified yesterday on direct that you first learned of the claim by Universal as a consequence of a telephone call that you received from your Los Angeles attorney, Mr. Clark?

A. Yes, sir.

Q. You put that on or about the 27th of April?

A. It was a few days before the telex, yes.

Q. Can you tell us when the first occasion was that you actually had in your hand and saw and read the telex that Universal sent to Nintendo in Japan?

A. It would have been several days after the 28th, maybe the 30th. I guess there's only 30 days in April.

Q. Mr. Arakawa provided you with a copy?

A. Mr. Arakawa a called me at home and told me the substance of the telex. I believe he may have -- I recall

us comfort at all?

A. No.

Q. He didn't say that. All right.

The sum and substance of it was that, whether he used those words or did not, when you left that caucus Nintendo refused to give Coleco an indemnity, did it not?

A. There was no indemnification language in the agreement.

Q. I am aware of that. I am asking you whether you gave him one notwithstanding the contract provisions. I certainly didn't volunteer one.

Q. He asked you for one didn't he?

A. He made a passing reference to it.

Q. You said he made a passing reference to it as well in the telephone conversation you had that preceded the May 6 meeting. What was the passing reference in the telephone conversation?

A. He knew, he was aware there was no indemnification clause in the agreement that they had signed. It was as simple as that.

Q. Do you recall, Mr. Lincoln, that Mr. Schwefel repeated his request for an indemnity of Nintendo subsequent to the May 6 meeting in subsequent telephone conversations with you?

A. At some point in those phone conversations that

I had with him he again made reference to the fact that there was no indemnification and he may have asked me will Nintendo give an indemnification.

But my recollection of this is that he almost answered his own question. I didn't have to answer the question or really get into it. He simply said, well, of course, there's no indemnification clause in the agreement.

Q. And there was no warranty or representation as to the validity of the Donkey Kong trademark with respect to third-party claimants, was there?

A. That's way I put it in the agreement that we sent to him.

Q. But you had the opportunity when Mr. Schwefel asked you to give him that to give him it but you didn't give it to him, did you?

A. We didn't give it to him.

Q. And you never gave it to him, correct?

A. We never gave it to him.

Q. To this day Nintendo has not granted Coleco an indemnity against claims from Universal on those two licensing agreements, correct?

A. That's correct.

Q. Did you know as of June 16 that Coleco was going to sign an agreement with Universal?

A. I was told on June 16 by Mr. Hadl that Coleco

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Q. Nintendo did not contribute to it?

A. No.

Q. Just to clear up a few more points on the Coleco licenses.

The royalty rate that Coleco was to pay Nintendo was agreed contemporaneous I assume with the execution of those agreements in February of 1982?

A. I think it was agreed in November of 1981?

Q. Even before in November of 1981?

A. Yes.

Q. At November of 1981 the royalty rates payable by Coleco to Nintendo on the sales of the tabletop game and the cartridge were agreed and fixed in the agreement, correct?

A. There was an oral agreement.

Q. And it was subsequently embodied in the written agreements, 12 and 12 A?

A. Certainly.

Q. That was never changed during the course of those contracts, correct?

A. You mean between the time that Nintendo agreed to grant the licenses?

Q. No. I mean during the course of the execution of it. Coleco went on to make the game we all know, correct?

A. Sure.

Q. Coleco has continued to pay those royalities as long as it was making sales, correct?

A. Yes.

Q. That's all I am trying to establish. As far as I know Nintendo has never taken the position that Coleco has refused to pay royalities under that agreement that are owed to Nintendo; is that correct?

A. We have had occasional disputes or problems in collecting royalities.

Q. But not of anything having to do with the Coleco/Universal covenant not to sue?

A. No.

Q. These are disputes that one might ordinarily expect with licensees I suppose?

A. I suppose.

Q. That's the gist of what my question is.

A. Yes.

Q. Nintendo's royalities under those agreements are based on the number of units sold by Coleco, correct?

A. Yes.

Q. So the marketing and the skills and the ability to sell those games was entirely left to Coleco?

A. Yes.

Q. And I believe we already established you had

given a press release saying that Coleco and Atari had lucrative licensing arrangements and this was in October of 1984, they were doing a good job?

A. Did you ask me a question?

Q. Yes. We went over it before. I am going back to another point that in October of 1984 a press release was issued by Nintendo referring to those agreements and Donkey Kong saying it quickly achieved popularity in the arcades and became a lucrative licensing property in the United States of companies like Coleco and Atari?

A. Yes.

Q. Is the gist of your claim with respect to Coleco that it breached those two agreements, 12 and 12 A because it settled with with Universal rather than defend that claim; is that the act that impaired?

A. The act that impaired it was the settlement and the license.

Q. Was it your understanding, Mr. Lincoln, that Coleco did not have the right to settle a legal claim against it for trademark infringement under those agreements?

A. I would have to look at the agreements.

Q. Let me direct your attention specifically to paragraph 13 C.

THE COURT: Page 12.

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connection with the Donkey Kong audiovisual game, when in fact there is no connection at all.

You saw that letter on the 15 or 16th or shortly thereafter?

A. Yes.

Q. So you were aware that the description given by Mr. Schwefel at that point was based on something having to do with a catalogue as opposed to a game?

A. That's correct.

Q. Did you subsequently learn that Mr. Schwefel had sent or Coleco had sent a lawyer from Kaye Scholer to Chicago to take a look at the game?

A. Yes.

Q. Did Mr. Schwefel report back to you that based on the report of that lawyer that Coleco would take no action against the game?

A. Yes.

Q. Did he tell you that was because, A, the game was a pretty crumby game and Coleco didn't want Tiger to improve it in some way to make it better?

A. That's what he said.

Q. And if they forced further changes in the game that might result, correct?

A. That's what he said.

Q. Didn't he also tell you that as far as an

infringement claim is concerned under the copyright laws his view and his lawyers' view was that it was an if fee question?

A. That's what he told me.

Q. You had no position to contradict him at that point, had you?

A. I hadn't seen the game.

Q. Had Coleco submitted any kind of a draft of this letter before it went out, to Nintendo?

A. I don't think so.

Q. You were unaware as of May 14 that Coleco was claiming that King Kong was confusingly similar to Donkey Kong?

A. I didn't see a draft of the letter. I just got a copy.

Q. Did Mr. Schwefel tell you at sometime when you were discussing this Tiger game that Universal had told him that if Coleco had any problems with the Tiger game Universal would make certain that it was changed?

A. I don't recall that. I don't recall that because my recollection is that Hadl said the license had been terminated. That's my recollection.

Q. But you had subsequent conversations with Mr. Schwefel, did you not?

A. Yes, I did.

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Q. At some point you learned that it was not terminated?

A. At some point I did.

Q. The question is not really accurate: At some point you learned that the agreement had been reconstituted or redone? It may have been terminated but then it was redone again?

I am not suggesting to you that it was not terminated at one point. I want to be clear on that.

Nintendo never sued Tiger, correct?

A. That's correct.

Q. As I understand it, it is the policy of Nintendo .. and I believe you have taken adds out in the trade press .. to vigorously pursue knockoff imitations of Donkey Kong and Donkey Kong Jr. and Nintendo protected properties; is that correct?

A. It is very clearly the policy of Nintendo to go after infringers.

Q. You brought something like about 22 lawsuits in this country over knockoffs?

A. We brought a lot of lawsuits.

Q. Of those 22 lawsuits that you have brought 19 I believe were over a game called Crazy Kong or Kong Gorilla?

A. I don't know if the number is 19.

Q. A major portion of them?

A. I think you are probably looking at subparagraph B.

Q. C, "each party shall have", the very last paragraph.

A. Right. Okay.

Yes.

Q. It was your understanding that they could defend it but couldn't settle it?

A. That's what the language says.

Q. Can you tell us, Mr. Lincoln, when the first time was that you saw the Tiger tabletop game?

A. It would have been sometime in 1982, Mr. Fairhurst. I can't give you a month.

Q. Would that be also true of the cassette?

A. Yes. It was clearly sometime in 1982. It was clearly after May 14th.

Q. After the litigation commenced, correct, the litigation I mean the lawsuit--

A I can't pin it down.

Q. You knew nothing about the Tiger game when you went down to Universal on May 6th?

A. No.

Q. When you learned that Tiger eletronic had been granted a license by Universal to make a tabletop King Kong game and a King Kong video cassette for home use from Mr.

duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KIRBY:

Q. Mr. Pederson, by whom are you presently employed?

A. Nintendo of America.

Q. How long have you been employed by Nintendo of America?

A. Since June of 1981.

Q. What position do you hold at Nintendo of America today?

A. Technical services manager.

Q. Has that been your title since your employment in June of 1981?

A. My title began as service manager.

Q. Have your duties changed between June 1981 and the present?

A. No, they are not.

Q. Would you basically describe what your work at Nintendo consists of?

A. I oversee the repair of printed circuit boards and oversee the parts department.

Q. Mr. Pederson, I am going to put in front of you what has been marked for identification as Defendant's Exhibit's 102, labeled testimony of John Pedersen.

Would you please look at that and tell me

boards, those being a girder board, the rivets board, the elevator board and the conveyor board. The object of the game is to maneuver the men that you control to the top of the screen to save the girl that has been captured by Donkey Kong. While maneuvering to the top of the screen you have to avoid objects such as barrels rolling down, jump over them, fire balls, and picking up prizes along the way, to get to the top.

Q. The Colecovision Donkey Kong cartridge and Donkey Kong table top game use the same audiovisual work that is used in the Nintendo coin-op game?

A. Yes, it does, but the Colecovision cartridge only contains three of those boards, being the girders board, the rivet board and the elevator board.

Q. How many boards are contained in the Colecovision Donkey Kong table top game?

A. Just two, the girders board and the rivet board.

Q. Is there any reason why the Donkey Kong home video game made by Colecovision only contains three boards rather than the four on the coin-op game?

A. Limited size of memory.

Q. Is that the same reason why the table top game, the Donkey Kong Colecovision table top game contains fewer boards than the Donkey Kong Colecovision home video game?

A. That and the fact that the display medium is

player here, Mr. Arakawa, who has been identified to the court. Would you please get us to the next board anyway, court.

MR. KIRBY: This next board, your Honor, is the rivets board as to which Mr. Pederson was testifying. As the maneuverable player moves across the girders which are now horizontal rather than slanted, he knocks out the rivets. Thereafter, once the gap is created he must jump over the gaps. He must also continue to jump over the obstacles, and he gets additional points as he picks up any prizes that happen to be lying around in these ramps.

Your Honor, the next board, if we may, your Honor, let him do more and see if he can show you the next board, and then I think we can move to the next games.

THE COURT: By the way, do you get a stated time when you put the coin in?

MR. KIRBY: No, your Honor. I think you have three players. The man reappears three times and you can keep playing as long as you can keep all three alive, and when and the third one dies, the game is over. So for players like me that might last a minute or less. My son can make it three or four minutes and more experienced players can keep it going for quite some time.

This is now the elevator board, your Honor, the third board and the last board embodied in the Colecovision home cartridge system. Your Honor will note that there are

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A. Yes, they are.

Q. And are those prizes umbrellas and purses?

A. Umbrella, shoe, a necklace, and what appears to be a purse.

MR. KIRBY: Your Honor, may we now proceed or would you like to see more?

THE COURT: No, that is fine, thanks.

Q. Mr. Pederson, in your testimony prior to playing the games you described the process of copying a game from the coin-op down to the less memory, less display, less circuitry home video game and to the even more reduced table top game. In your opinion, were the Tiger King Kong games created by somebody sitting down and watching the Donkey Kong game and programming it accordingly?

A. Yes.

Q. When you were playing the Tiger King Kong games, is the total concept and feel of those games substantially similar to that of the Donkey Kong games?

MS. FAUCHER: Objection, your Honor.

THE COURT: Overruled.

A. Yes.

MR. KIRBY: I have no further questions of the witness at this time, your Honor.

CROSS-EXAMINATION

BY MS. FAUCHER:

Q. Mr. Pederson, Mr. Kirby asked you some questions about the audio visual work that is in, for example, the Donkey Kong arcade game. Is the audio visual work in a game everything that you see and hear when you are playing a game? Is that basically what the audio visual work is?

A. What you see and hear, yes.

Q. It is everything that you see and hear?

A. The audiovisual work is the total concept and feel of the game as you play it.

Q. The audio visual work is the total concept and feel of the game?

A. That is my understanding of it, yes.

Q. I believe in your statement you discussed at a variety of places the audiovisual work in the Donkey Kong game. I am asking if that is everything that you see and hear when you are playing the game.

A. Yes.

Q. You also said in your statement that you understand that Nintendo has a copyright registration for the audiovisual work in the arcade game?

A. Right.

Q. Did you have anything to do with procuring that copyright registration for Nintendo?

A. No, I did not.

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at trade shows?

A. No.

Q. I realize you have played the King Kong table top game and the TV version. Have you played the Quartz Game Clock Game?

A. No.

Q. No one has asked you to play that game?

A. No.

Q. You are not familiar with it?

A. No.

Q. What about the King Kong Hand Help Game?

A. No, I am not familiar with that one either.

Q. You mentioned before, I believe, on direct testimony that the object of the Donkey Kong game is to maneuver the player to the top of the board to free a girl from the hands of Donkey Kong. I may be paraphrasing a little but do you agree with me that is the object of Donkey Kong?

A. That is correct.

Q. Having played the Tiger games, do you agree with me the object of the Tiger games is to maneuver the hero to the top of the board to free the girl from the hands of a big gorilla?

A. Yes.

Q. That is true for both the Tiger home video

you said, very close in that other lawsuit to everything you see and hear in the Donkey Kong game?

A. Substantially similar, yes.

Q. And I believe you said in Detroit that meant to you very close.

A. It was much closer, yes.

Q. But everything you see and hear in the Donkey Kong games you do think is substantially similar to everything you see and hear in the Tiger games that we had before?

A. Yes.

Q. I believe you also said that you thought that the total concept and feel of the Tiger games and the Donkey Kong games was similar, substantially similar, is that correct?

A. Yes.

Q. When you say, and you said it in your statement, concept and feel, when you are talking about the concept of the Donkey Kong game, you are talking about the object of the game, that the player is supposed to move up the board to rescue the person from Donkey Kong?

A. Yes, that is the concept.

Q. And when you say the feel of the game you are talking about the game play or the patterns of movement that we were talking about before, the fact that the player

moves back and forth and up and down the board and avoids obstacles, jumps over obstacles?

A. Yes.

Q. So that is what you mean when you say concept and feel, you are talking about the object of the game and the patterns and movement of the player?

A. Yes.

Q. You also mentioned when Mr. Kirby was questioning you, and you certainly said it in your statement, that you keep current with new games that are out on the market, individual arcade games, and you said in your statement home video games and table top games.

A. I believe the statement said I was familiar with.

Q. And you also said that you keep current with development in the individual arcade industry. I assume that meant new games.

A. In the individual arcade games, yes.

Q. I am speaking about individual arcade games. I am not going to ask you about Monopoly.

Are you familiar with the fact that you can play individual games in the home on a computer too?

A. Yes.

Q. There is a market for cartridges or discs or whatever where you can, I suppose, play Donkey Kong too, can't you?

and memory chips roughly equivalent to what was in the, for example, the Donkey Kong video game; is that correct? That's a different process?

A. It's a different process, yes.

Q. What is that process, when you go from a game with 28K, 12 memory chips, printed circuitry of a certain type which you can take out and physically examine, when you want to copy from that to another coin game making maybe a few changes or making changes to make it not appear quite as similar, what do you do?

A. You would take the memory chips that were contained in the original game, download some of those into a computer, make some slight changes and then program new chips so that the changes would appear on the other game.

Q. What about the eletronic circuitry, how would you transpose one to the other to copy it?

A. You would just physically copy the boards, like a photograph process, and then load in the same circuitry that was on the original board into the board that you have made so that it works identically.

MR. KIRBY: I have nothing further, your Honor.

THE COURT: Based on what you have just testified to, Mr. Pedersen, do you have a conclusion as to how physically or mechanically, however you want to put it I understand your belief that they are substantially

similar, that is the home video games -- do you have a view as to how it was done?

THE WITNESS: By looking at a Donkey Kong arcade game and programming into -- a programer sitting down and trying to reproduce what was on the diagnosis arcade game.

THE COURT: But not through a physical examination of the chips or the PC boards?

THE WITNESS: No.

RECROSS-EXAMINATION

BY MS. FAUCHER:

Q. That lawsuit you testified in Detroit against the Crazy Kong game that I think you said was an arcade game?

A. Yes.

Q. In that case was it your belief the copying was done by downloading the chips into the computer and then replicating them in the Crazy Kong game?

A. The circuitry on the Crazy Kong game was different. I did not have a chance to examine it to see how close it was to a Donkey Kong game.

Q. So you don't have an opinion as to how the game was copied?

A. No.

THE COURT: Thank you, Mr. Pedersen.

(Witness excused)

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MR. KIRBY: Your Honor, I have discussed with Mr. Fairhurst one issue and that is that in our interrogatory requests we have asked them and they have supplied and periodically updated the royalty information with respect to royalities received from Atari by Universal, Coleco, Ruby Spears and Tiger. Based on our discussions, it's apparent that there is very little updating to do as of the date of this trial and he has agreed to do any updating that is required and subject to that updating and introducing that into the record Nintendo rests.

MR. FAIRHURST: Your Honor, with this point, we would move to dismiss all of the claims and if your Honor wants to give me an oral argument on any of them I would be willing to give it.

THE COURT: I don't think so. Thank you. I understand the nature of the motion. I can imagine, given the clarity and vigor of your opening statement, what the motion would be and it's denied.

MR. FAIRHURST: At this point Universal would commence its own direct case and I think we'll start by putting in evidence the exhibits that your Honor does not now have before him and to which there may or may not be some objection. I don't think there are very many.

We have designated as to Plaintiff's Exhibit A an index of the documents and deposition exhibits in the

to, the Universal designation of deposition testimony and other evidence from the clerk's record.

(Plaintiff's Exhibits 1 through 107 for identification were received in evidence)

MR. FAIRHURST: So your Honor has a complete set of exhibits, Plaintiff's Exhibits 92 through 107 were recently designated and it is a supplemental to the other exhibit booklets.

Finally, deposition excerpts that Universal would refer to and Nintendo's interrogatory responses.

I am going to call my first witness, if I may.

THE COURT: Fine.

MR. FAIRHURST: Joseph V. DiMuro.

JOSEPH V. DiMURO,

called as a witness by plaintiff defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FAIRHURST:

Q. Mr. DiMuro, would you please tell the court what your present relationship with Universal City Studios is?

A. I am a consultant under a contract which goes back to April 1, 1977. Under this arrangement, I am employed or rather engaged as an independent contractor to render services for Universal City Studios, Inc. and these duties encompass doing assignments for various executives

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of the company on a one to one level, drafting contracts, making legal decisions with respect to these matters and if, in my judgment, an opinion of outside counsel might be required, contacting outside counsel and getting the necessary opinion.

Q. At some point in time, Mr. DiMuro, did you serve Universal in a different capacity?

A. Yes, I did.

Q. What was that?

A. I was approached by Universal or rather MCA in 1964 to join their legal staff. I joined MCA in October of 1964 and continued as an employee of MCA until March 31, 1977. In January of 1972, I was appointed house counsel or head of the law department and I held that position as house counsel until I reached mandatory retirement age on December 25, 1976. But I actually held over in that capacity until March 31, 1977.

Q. Prior to joining the Universal legal department in 1964, you were on the legal department of 20th Century Fox?

A. That is correct.

Q. How long had you worked at Fox?

A. I joined the 20th Century Fox law department in 1950 and was there for a period of 14 years until 1964 when MCA approached me for a position with the MCA law department.

of distribution rights in that motion picture. I will prepare a contract evidencing that arrangement.

Q. Now, at some point while you were at Universal serving as a legal advisor, you became involved in litigation representing Universal, assisting Universal, with RKO over King Kong?

A. That's correct.

Q. Would you please tell us when you became involved in King Kong litigation for the first time?

A. Beginning in 1975. The genesis of the litigation came about because Universal believed it had an oral contract with RKO to do a remake of the 1933 RKO classic King Kong.

Shortly after this oral contract, RKO granted a license to Dino DiLaurentiis to produce a remake of King Kong and at that point Universal initiated a breach of contract action against RKO and Dino DiLaurentiis Corporation and Dino DiLaurentiis in the Superior Court, Los Angeles, California.

Q. You stayed Universal initiated the state court action. Who were your attorneys that filed that action?

A. That action was filed by Universal's outside counsel, Rosenfeld Meyer and Susman.

Q. This is a law firm in Los Angeles?

A. A law firm located in Beverly Hills, California.

Q. Now, during the course of that litigation Universal was represented by that law firm. Was there one particular lawyer who handled most of the litigated matters for Universal?

A. Yes. In that litigation Steven Kroft, a partner in the Rosenfeld firm, handled the state court action.

Q. You said that Universal had struck an oral deal I don't know if you used the term oral deal, but thought it had a deal with RKO to make a remake of the of the 1933 picture, did Universal thereafter think it had that deal when Universal began to do development work on such a picture?

A. In June of 1975, after I had reviewed a Brylawski -- Mr. Brylawski is an attorney in Washington, D.C. who renders a service to the motion picture companies with respect to the copyright status of properties which a particular studio may be interested in purchasing. Universal requested a report as to the copyright status of the King Kong story and based on our evaluation of that Brylawski report. It appeared to me that perhaps the renewal copyright -- the original King Kong story was published by Crossett & Dunlop in 1932 and was copyrighted in the name of that publisher.

In 19609, Patricia Frere, a daughter of Edgar Wallace, filed an application for the renewal of that

copyright with the U.S. Register of Copyrights in Washington, D.C. I felt that Miss Frere was not the proper party to file the renewal application, that she was not the proper party to renew inasmuch as the copyright inhered in Grossett & Dunlop and we could find no evidence of an assignment from Grossett & Dunlop, the publisher, to Miss Frere.

I consulted professor Melville Nimmer, who is a professor at UCLA School of Law and asked him if he agreed with my opinion that the copyright renewal by Miss Frere was inappropriate.

Professor Nimmer studied the matter and gave us a written opinion to the effect that, indeed, based on the information that was then available that the attempted renewal by Miss Frere was invalid.

(Continued on next page)

Q. Have you finished your answer?

A. Yes.

Q. Subsequently, Universal filed a federal action against RKO, did it not?

A. Right, based in part upon this opinion of Professor Nimmer Universal filed a declaratory relief action against RKO and Dino De Laurentis Corporation, seeking a determination that the King Kong story be adjudged in the public domain by reason of a defective copyright renewal.

Q. What was happening with respect to the picture that Universal was planning to do, based on a remake -- not based on -- the picture that would have been a remake of the 1933 RKO King Kong?

A. Concurrently with these events, Universal had elected to proceed with the production of a motion picture, and in discussions with our insurance carrier was able to obtain what we call production cost insurance for the production of this motion picture, and with that insurance in hand Universal proceeded to engage a screenplay writer for the writing of the screenplay for the motion picture.

Q. What happened after that?

A. As it turned out, the screenplay writer made the unfortunate mistake of screening the RKO 1933 motion picture and the insurance carrier took the position that

this was a violation of the terms of the production cost insurance, and on that basis denied coverage, and in that situation Universal decided to abandon the project.

Q. As this litigation went on in California in the state court for breach of contract and in the federal court seeking a declaratory judgment as to the invalidity of the underlying King Kong story under copyright, what was your role in that litigation? I use that word role in the broadest sense of the term. What did you do to assist Universal, if I may, in prosecuting, mostly prosecuting, but also defending the claims against it by RKO?

A. During this period I was house counsel and head of the law department. I analyzed the Velsky copyright report, I obtained the opinion of Professor Nimmer, I was involved in the analysis and review of findings of fact and conclusions of law, I made suggested revisions -- let me rephrase that. I suggested revisions of these documents.

Q. Did you see the pleadings -- I am sorry.

A. I also reviewed the complaints which were filed and various pleadings that were filed in the course of the litigation.

Q. Did you assist Mr. Kroft in getting documents and answering document requests and interrogatories and so forth?

A. Yes. In addition to what I have just testified

to I was the liaison with the Rosenfeld, Meyer Sussman office in obtaining information for any interrogatories and in collecting that information for submission to Mr. Kroft.

Q. Insofar as you had occasion to report developments of that lawsuit as they were proceeding between 1975 and the end of it, really, which is through 1980, to whom did you report internally?

A. I reported to Mr. Sid Sheinberg, the president of MCA, and to Mr. Lieu Wasserman, the chairman of the board of MCA.

Q. Did there come a time when that litigation all came to an end in some way?

A. Yes.

Q. Would you tell us as briefly as you can, without trying to summarize the multiplicity of documents and everything, what the gist of the settlement was as you understood it.

A. The gist of the settlement agreed to by Mr. Sheinberg for Universal and Mr. O'Neal of RKO was that the various lawsuits would be dismissed. Universal executed a release in favor of RKO and RKO in turn released Universal. This goes into the terms of the settlement agreement of June 4, 1980. Under that agreement RKO agreed that Universal could produce motion picture photoplays utilizing the King Kong character and the King Kong story and the

King Kong name, and these photoplays as well as the King Kong character could be substantially similar to the 1933 RKO motion picture or the succeeding RKO picture called Son of Kong.

The only prohibition in this settlement agreement was that Universal could not make a verbatim copy of the King Kong character as it appeared in the 1933 movie, nor could Universal take clips or extracts from the 1933 movie or the secuel to that movie produced by RKO and use those clips from those pictures.

Q. Aside from the settlement with RKO to which you have referred in June 1980, were there also agreements undertaken with others who had rights in King Kong?

A. Yes.

Q. What were they, the principal ones? Don't tell me everything.

A. Right. The basic agreement is the agreement in December of 1976 between Universal and Major Richard Cooper, the son of Marion Cooper, the author of the King Kong story along with Edgar Wallace. Under this agreement Universal acquired all of Cooper's rights in the main character and story King Kong, and could exercise these rights without limitation, except for the fact that Major Cooper reserved the publishing rights in the King Kong story.

Q. By which you mean book publishing rights?

A. Book publishing rights.

As a preface to this agreement let me mention that Judge Real in the U.S. District Court declaratory relief action found that as between Major Cooper and RKO Major Cooper retained all rights into the name, character and story King Kong, all merchandising rights including the good will from the exercise of these merchandising rights, and RKO simply had an one-picture license to do the 1933 King Kong movie and the sequel to that movie called Son of Kong.

This judgment was part of the chain of title in the rights which Universal acquired from Major Cooper.

Q. In other words, you had a judgment issued by Judge Real on Cooper's claims against RKO as one part of the chain of title, an agreement between Cooper and Universal as a second part, and a subsequent settlement agreement with RKO, is that correct?

A. That is correct.

Q. At the time, Mr. DiMuro -- when I say at the time, say 1980 -- I am going to try and fix on a point -- did you have an understanding of any kind as to whether RKO or its licensees were actually exploiting these merchandising rights?

A. The merchandising rights under Judge Real's judgment in favor of Richard Cooper, RKO was the

constructive trustee for the benefit of Major Cooper, and RKO was required to transfer all merchandising licenses to Major Cooper, not one or two licenses, the totality of the licenses and its entire merchandising business, and the good will generated by that business.

Q. Did you know then whether there were products and services on the market being sold by anyone with the word King Kong or King Kong gorilla on them?

THE COURT: Let's be a little careful about the "then."

Q. When I say then, I mean in 1980 first when RKO entered into the settlement agreement with Universal.

A. Yes, there had been an extensive merchandising program by Paramount Pictures Corporation which was the United States distributor of the 1976 De Laurentis movie, the King Kong movie, and we were well aware of this merchandising activity and the good will generated by it.

Q. Did you have occasion to deal with RKO, DDLC -- by which I mean Dino De Laurentis Corp. I think it would be helpful if you put DDLC, Madam Reporter -- and Paramount in 1980 with respect to their merchandising activities? I am going to use the word deal in the broadest sense to let you tell us what you knew about it or what your dealings were.

A. Yes, I did.

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Q. What was the nature of those dealings?

A. I sent notices out to Lou Petrich --

Q. Identify him, please.

A. Lou Petrich, the firm of Youngman Hungate and Leopold, the attorneys for RKO. And I notified Mr. Petrich that RKO's rights, merchandising rights, as well as the merchandising rights of Dino De Laurentis Corporation and Paramount Pictures Corporation, with respect to the 1976 movie had expired as of December 1969 and that Universal intended to begin the exploitation of these merchandising rights.

Q. You said '69. You meant '79, did you not?

A. '79, I am sorry.

Q. I put in front of you what has been marked as Plaintiff's Exhibit 6. Is that the correspondence you had with Mr. Petrich on the subject?

A. Yes, it is.

Q. Do you recall whether you wrote to others involved in King Kong merchandising at that time, and I again mean July 1980?

A. Yes. I wrote to Mr. Fred Sidewater, the senior executive of Dino De Laurentis Corporation, and I wrote to Paramount Pictures Corporation.

Q. That was Mr. Ralph Kamon at Paramount?

A. That is correct.

Q. Let me put in front of you what has been identified in the case of Mr. Kamon as Plaintiff's Exhibit 5, and in the case of Mr. Sidewater, Plaintiff's Exhibit 4. We now have 4, 5 and 6.

You wrote all these people at that time apprising them of Universal's intention to begin the exploitation of its merchandising rights in King Kong, is that correct?

A. That is correct.

Q. Prior to writing that memorandum, Mr. DiMuro, did you have occasion to advise your client, Mr. Sheinberg, as to whether Universal could proceed to exercise merchandising rights?

A. Yes, I did.

Q. Do you remember when that was?

A. Yes. That was in June of 1980.

Q. Let me put before you what has been marked for identification and offered in evidence as Plaintiff's Exhibit 3. You will note the first paragraph of the memorandum, which is from Mr. DiMuro to Mr. Sheinberg, and I am not going to read off the carbon copy recipients, subject is King Kong merchandising rights, and it says: "This will reply to your inquiry regarding the King Kong merchandising rights."

Would you tell us, Mr. DiMuro, what you recall

today of what that inquiry was by Mr. Sheinberg.

A. Mr. Sheinberg telephoned me and stated that he wanted to know what merchandising rights Universal had in King Kong because he planned to have Universal's merchandising arm, Merchandising Corporation of America, exploit these rights. I reviewed the documents which are set out in this memorandum of June 18, 1980, and after a review of these documents I gave an opinion in my memorandum that the merchandising rights of Paramount and Dino De Laurentis Corporation expired by December 1979 and that Universal was free to exercise the merchandising rights after that date.

Q. Contemporaneous with writing that memorandum to Mr. Sheinberg, did you have occasion to discuss the matter of merchandising rights with anyone else within Universal? I don't mean your outside counsel at this moment, I mean inside Universal.

A. I am not quite sure.

Q. Maybe I can clear up the question. In writing the memorandum did you consult with others at Universal inside?

A. No, I did not.

Q. Did you consult with anyone outside?

A. I believe I discussed the subject of the memorandum with Steve Kroft, our outside counsel, prior to

the writing of this memorandum.

Q. Subsequent to the writing of the memorandum did you discuss the contents of that memorandum with anyone?

A. Yes, I did.

Q. With whom?

A. Loretta Sifuentes.

Q. Could you tell us what her position then was?

A. Loretta Sifuentes in 1980 was a member of the merchandising department, Merchandising Corporation of America, and she worked with Steve Adler in connection with the merchandising of various Universal pictures like Jaws and pictures of that sort.

Q. Who is Mr. Adler?

A. Steve Adler was in charge of the merchandising department at that time.

Q. Did Miss Sifuentes report directly to you?

A. She did not.

Q. Who did she report to?

A. Excuse me. At one point she was in the law department.

Q. But that was prior to that.

A. She would have reported to me at that time. In this period, June 1980, she would not have reported to me, no.

Q. In point of fact you did hire Miss Sifuentes,

did you not?

A. Yes, I did, when I was house counsel.

Q. Before you wrote your letter to Mr. Petrich in July, did you discuss with Mr. Kroft your advising Mr. Petrich, Mr. Kamon and Mr. Sidewater of Universal's intention to exploit these merchandising rights?

A. Yes, I believe I did.

Q. Do you recall receiving -- I will put in front of you what has been marked for identification as Plaintiff's Exhibit 92 and also while I am at it Plaintiff's Exhibit 93, letters from Mr. Kroft to Mr. Di'Muro on the dates recited in the exhibits.

Do you recall discussing the the matter of when Universal could begin exercising these Universal merchandising rights?

A. I had referred to the documents in the memorandum, so I was satisfied as to the dates but I believe that I also checked out my interpretation of the documents with Mr. Kroft.

Q. Are the sum and substance of Mr. Kroft's thoughts on it reflected in the two exhibits I just put in front of you?

A. Yes, they are.

Q. Talking about the merchandising rights, and this is what you advised Mr. Sheinberg about and this is what he

inquired about and this is what he wrote to you on, would you tell us, Mr. DiMuro, what you understand merchandising rights to mean.

A. The merchandising rights which Mr. Sheinberg was interested in and as understood in the industry would be the right to use or to license the use of the name or likeness of a character from a movie on or in connection with a product such as games, toys, posters, T-shirts, other items of wearing apparel, and the right to sell these items with the movie character's name or likeness on them.

The character can be an inanimate character like King Kong, or like the Universal Jaws merchandising campaign, or Universal's ET merchandising campaign, or the character may be an actor like Robert Duvall playing Sherlock Holmes.

Q. Do you recall whether you received a response from RKO or Dino De Laurentis or Paramount in respect to the letters that you sent out?

A. I recall that I received a response from Mr. Kamon at Paramount Pictures Corporation.

Q. Let me show you an exhibit that is marked Plaintiff's Exhibit 95 and ask you if that is the response that you referred to. It is not Mr. Kamon, it is Mr. Cosby, but he is at Paramount also?

A. Yes, he is.

Q. Did you discuss with Mr. Cosby the contents of Plaintiff's Exhibit 95?

A. I remember this letter but I don't recall that I specifically discussed it with Mr. Cosby. The letter seems clear on its face and there would be no reason to discuss it with him, that I can see.

Q. You told us a few minutes ago that you had a discussion that you recall with Miss Sifuentes sometime after you sent your memo to Mr. Sheinberg -- that is Plaintiff's Exhibit 3. Do you have that in front of you still?

A. Yes, I have it here.

Q. What do you recall, as best you can tell us now, about that discussion?

A. The conversation was shortly after my writing of the June 18, 1980 memo. I received a call from Mrs. Sifuentes, who was then working with Steve Adler in the merchandising department. Mrs. Sifuentes said to me, "I have read your memorandum of June 18, 1980 to Mr. Sheinberg. I take it this means that Universal has the right to merchandise King Kong."

I said, "That is correct," and that was the substance of the conversation.

Q. Did you have any discussion with her at that time as to exactly what that meant in practical terms?

virtually contemporaneous with sending the memorandum and we will put it arbitrarily at July 1, 1980.

Do you recall any discussions during the summer of 1980 having to do with the actual implementation of these merchandising rights pursuant to the memo?

A. I do not.

Q. Did there come a time when you had occasion to discuss the subject of merchandising rights possessed by Universal with others outside of Universal and its family? By that I mean the Universal umbrella of companies and its outside counsel. That is the family to which I have referred.

A. Over what period of time are we talking about now?

Q. I will try to do it in segments, sometime subsequent to June or July 1980.

A. I had a request from Mrs. Sifuentes subsequent to September 1981, asking for assistance in getting some copyrighted stills from RKO, that is, stills of the 1933 motion picture, because it seemed that in some of our merchandising arrangements some of the potential licensees were particularly interested in the still copyrighted by RKO of the gorilla on top of the Empire State Building.

MR. KIRBY: Your Honor, I object and move to strike that. It is totally nonresponsive to the question.

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BY MR. FAIRHURST:

Q. Let me ask you, do you recall ever discussing the contents of Exhibit 96 with Mr. Regan?

A. Yes, I do.

Q. What do you recall about the conversation?

MR. KIRBY: Objection.

THE COURT: Overruled.

A. I recall I took the position that in any merchandising relating to the name or character King Kong that Universal had the totality of these rights. However, if the potential licensee wanted a copyrighted RKO still in connection with that specific merchandising arrangement that the consent of RKO would be required.

Mr. Regan took the position in addition to RKO's consent being required for the use of the copyrighted still that RKO possibly had the right to use that still anyway it felt and I disagreed with him that if the use of the still involved a merchandising operation that RKO had no such right.

Q. Did you have any disagreement with Mr. Regan over the use of the King Kong name for merchandising purposes?

A. Not at all, never.

Q. Did that ever come up? Was there ever at any time, as far as you can tell us, any quarrel with Mr. Regan

or anyone else, any dispute, as to who had the right to use the King Kong name in merchandising?

MR. KIRBY: Objection

THE COUPT: Overruled.

A. It was clearly understood by Universal and agreed to by -- and never challenged by Mr. Regan or anyone else that Universal had the unrestricted and unlimited right to use the King Kong name in any form of merchandising.

Q. Now, this was in October of 1981 that you wrote this memo. What was your relationship, business, working relationship, at that time with Merchandising Corporation of America, by which I mean, so you can understand the question, did you have occasion to work with them on a daily basis or did you field inquiries from time to time as they may arise, depending on what the nature of the inquiry was?

MR. KIRBY: Objection, the leading should stop.

MR. FAIRHURST: It is not a leading question. It's a direct question.

MR. KIRBY: It's three leading questions.

MR. FAIRHURST: I am trying to define working relationship and not leave it ambiguous. If I use that term without the description, the witness could testify to something which would be totally misleading if we weren't

both working off the same vocabulary and that is not a leading question.

MR. KIRBY: Your Honor, I could suggest that one way to cure that is by asking a precise question, rather than three leading ones, so that the witness would understand and indeed I would have the opportunity of understanding in order to determine whether or not I wish to object to the question.

THE COURT: Overruled.

A. I have no --

Q. Do you still know the question, Mr. DiMuro?

A. Please, reread to it me.

THE COURT: There's a risk in that. It might be sustained on rereading.

Q. Mr. DiMuro, do the best you can.

A. I had a relationship with all of the departments and still have a relationship with all of the departments at the studio, if they need my advice they can ask for it. But depending on the matter that I am handling, I can't say that I have a day to day relationship with any department. It just depends on what work I am doing at the time.

Q. I take it from your testimony that you don't work as a legal advisor of the merchandising department?

A. Of course not.

Q. At any time in your working at Universal in the

last three or four years, has it been your responsibility to secure trademark recommendations for Universal trakemarks?

A. No.

Q. I take it then that you did not have anything to do with the securing or application for trademark recommendations for any King Kong properties?

A. That is correct.

Q. Did you subsequently learn there were such things after the fact?

A. Yes, I did.

Q. Was that mostly in the course of this litigation?

A. Yes, it was.

Q. Were you aware prior to the institution of this lawsuit, June 1982, of what trademark registers Universal held for anything?

A. I was not.

Q. You have read Ms. Sifuentes' deposition testimony in this case, both volumes, volume one and volume two?

A. Yes, I have.

Q. You were aware she gave testimony on one occasion and was subsequently redeposed?

A. Yes.

Q. You read that deposition testimony prior to your

being deposed yourself in this action, correct?

A. That is correct.

Q. You are aware that Miss Sifuentes has testified to having had a discussion with you sometime in February or early March 1982 relative to King Kong, are you not?

A. I am aware that that's in her deposition, yes.

Q. You are aware that she testified in substance that she had a telephone conversation with you in which a decision was reached by you that Universal did not have merchandising rights or trademark rights, rights of any kind to merchandise King Kong property?

A. I am aware she made at that statement.

MR. KIRBY: Objection to the paraphrase, your Honor.

MR. FAIRHURST: If you want I will read the --

THE COURT: It's not necessary.

MR. FAIRHUPST: I am trying for the gist of it. I can read the exact statement.

THE COURT: It's not necessary. Overruled.

Q. You are aware of that?

A. I am aware of it.

Q. Did you ever have that discussion, to which she testified, with Miss Sifuentes at any time?

A. I did not.

Q. Did you ever come to a decision that Universal

did not have rights to license in King Kong?

A. I did not.

Q. Would you, if you could have come to that decision --

MR. KIRBY: Objection.

THE COURT: Sustained.

Q. Let me do it a different way.

Aside from your testifying that you didn't have that conversation, what would you have have had to do if you were going to make a decision like that within the corporation, what procedures would have been followed?

A. A decision of this sort would not have been made in a vacuum. It would have involved consultation with the present house counsel, Mr. Mittleman. Because of Mr. Sheinberg's ongoing interest in King Kong, going back to 1975, it would certainly have involved Mr. Sheinberg.

It would have involved a senior executive of the accounting department, in terms of the particular person who is responsible for merchandising receipts and it would have involved written memoranda that this decision had been made and distribution within the company of that decision.

Q. You didn't reach that decision then. Has there been any time, Mr. DiMuro, when you personally reached such a decision?

A. I did not.

Q. Did you ever advise Miss Sifuentes that you had reached such a decision?

A. I did not.

MR. KIRBY: Asked and answered.

Q. Did you ever advise anyone else in Universal or MCA that you had reached such a decision?

A. Never, I did not.

Q. Do you recall discussing with Miss Sifuentes the subject of Tiger's agreement with Universal under which Tiger was licensed to make a King Kong cassette game and a King Kong tabletop game? You were sitting here in court this morning, so you saw the games?

A. Yes, there was a time when Miss Sifuentes contacted me, sometime prior to May of 1982 I believe. She was concerned that the Tiger people had not submitted any prototypes, had not submitted any art work or advertising formats in connection with their licensing of King Kong and she asked me if Tiger's failure to submit these items might be grounds for termination of the Tiger license agreement.

I reminded Miss Sifuentes that in the boiler plate of the license agreements that we use there is a requirement on the part of the licensee to furnish these items in advance of the manufacture of any of the articles covered by the license agreement and I advised Miss Sifuentes that in my opinion this constituted a breach by

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Tiger and, indeed, could be grounds for termination of the license agreement.

Q. Have you yourself, Mr. DiMuro, participated in the drafting of the licensing agreements with Universal King Kong licensees?

A. Yes. In 1983 --

Q. After this lawsuit was commenced?

A. Oh, yes. In 1983 I was involved in the preparation of a license authorizing a San Diego company, Robert Keith and Company to manufacture a huge inflatable replica of King Kong to celebrate the 50th anniversary of the release of the 1933 motion picture.

Q. That was the big balloon that didn't work too well?

A. On top of the Empire State Building. I personally prepared that license agreement for a stated consideration. It was executed by Universal or Merchandising Corporation of America. I don't have the agreement in front of me and the inflatable baloon went up on the Empire State Building. I don't know how successful it was. It went up.

I also, subsequent to that, advised one of my associates, Mr. Kricun with respect to granting a King Kong license to the Phillips organization. That license agreement was executed and subsequent to that --

Q. What was the Phillips organization, just so we understand?

A. The Phillips organization also had an inflatable type balloon of King Kong.

Subsequent to that, Mr. Kricun asked me for my advice on a situation in Southern California where a company called Sluggo was using the King Kong name in connection with the sale of giant hamburgers or hot dogs and I -- a cease and desist letter was sent out.

Q. I was asking on licensing.

MR. KIRBY: Your Honor, I object and move to strike not because I do want to impede the testimony but because we do need a question and answer. The question was licensing. The witness is now -- in effect, it's like pushing a button and we are getting everything he had to do thereafter and so I move to strike that.

THE COURT: I'll let it stand.

Q. Now, during the course of your involvement with King Kong rights you've had occasion to advise others in Universal with respect to what use or what use Universal could not make of the RKO picture; is that correct?

A. That is correct, yes.

Q. Have you given advice to the people who operate the Universal tour with respect to manufacture of a King Kong character at that tour?

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Q. Now, during the course of your involvement with King Kong rights you've had occasion to advise others in Universal with respect to what use or what use Universal could not make of the RKO picture; is that correct?

A. That is correct, yes.

Q. Have you given advice to the people who operate the Universal tour with respect to manufacture of a King Kong character at that tour?

A. Yes, I have.

Q. In substance, what was the advice? In substance, what was the nature of your advice?

A. The nature of the advice was that in doing a mock-up of King Kong or building an actual King Kong monster that we should not slavishly copy the RKO King Kong or the DiLaurentiis King Kong. This was my conservative opinion that we would be better off if we built our own.

Q. Didn't you at some point advise that the making of a generic ape that looked nothing like the RKO picture, nothing like the Dino DiLaurentiis ape in that picture?

A. Yes, I recall.

Q. You have given that advice to others?

A. Yes.

Q. What's the concern to which you are addressing that advice if I may be so bold to lead you that way?

MR. KIRBY: Objection.

THE COURT: Overruled.

A. It's a matter of copyright. Universal should not be in a position of copying a copying the RKO gorilla or the DiLaurentiis gorilla to the point that it would be substantially similar and, therefore, objectionable. Although, as I have testified before, the June 4, 1980 agreement gave us that leeway. I want to emphasize that.

Q. You at some point advised Mr. Sheinberg on the

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subject of making a new King Kong motion picture what Universal's concerns ought to be, did you not?

A. Yes, I did.

Q. Let me put in front of you what's been marked as Defendant's 89 and ask you if you recognize that as your advice to Mr. Sheinberg on that date with respect to Universal's position with respect to dealing with Dino DiLaurentiis in the production of a new motion picture film of King Kong?

A. Yes, I recall this.

Q. I want to specifically direct your attention, Mr. DiMuro, to the attachment which is denoted King Kong guidelines.

A. Yes.

Q. Do you recall whether you ever had occasion to discuss those guidelines with someone who was actually making a picture?

A. No, I don't recall that.

Q. So you drafted these, presented them, as it were, to Mr. Sheinberg and as far as you know you never actually had occasion to counsel on this particular memo?

A. Well, with one qualification. There was in the works an Universal project called The Son of King Kong. I am not sure if that's the precise title.

In any event, it was a production that Jennings

Lang was involved in and he consulted me about it and I don't recall -- I believe -- yes, I believe that this memo was initiated by reason of the Jennings Lang project.

Q. Do you actually recall consulting with Mr. Lang on guidelines at all?

A. Yes, I do.

Q. What was the substance of that consultation?

A. I didn't hear you.

Q. I said what was the substance of that consultation.

What did Mr. Lang ask you and what did you tell him?

MR. KIRBY: Objection.

Q. What did you tell him? That's fine.

MR. KIRBY: There's no foundation as to who Mr. Lang is and what his relationship with Universal is either.

THE COURT: Overruled.

MR. FAIRHURST: I will establish the foundation.

Q. Who is Jennings Lang?

A. Jennings Lang is an executive at MCA. He is a producer. He produced the Airport pictures and the sequels to the Airport pictures and several other Universal photoplays.

Q. What did you tell Mr. Lang when you had this consultation?

A. Well, I think, basically, I told him to stay away from the RKO gorilla and the DiLaurentiis gorilla. But again I repeat that we had the right to come very close to the RKO gorilla under the RKO/Universal settlement agreement. This was my conservative approach to the production to avoid any problems down the road.

THE COURT: How much longer do you think you will be?

MR. FAIRHURST: I am about 30 seconds away from concluding my direct examination. I have to tie up a loose end here. I believe it's a potential loose end.

Q. Mr. DiMuro, I put in front of you before Exhibits 93 and 94.

When you received Mr. Kroft's letter, which is Exhibit 93, on June 24, 1980, can you tell us that Mr. Petrich's letter was attached to it? That's all I'm asking. They are marked as separate exhibits. That's why I am doing that. If you can recall.

(Pause)

A Yes, I recall this as being attached to the Steve Kroft letter to me of June 24, 1980, this letter of June 20, 1980 from Lou Petrich to Kroft. I recall it being attached.

MR. FAIRHURST: No further questions.

THE COURT: We'll take a brief recess.

(Recess)

CROSS-EXAMINATION

BY MR. KIRBY:

Q. Mr. DiMuro, you have been designated by Universal, have you not, to be the contact person for Mr. Fairhurst in connection with the Nintendo litigation?

A. Not specifically, no.

Q. Have you been responsible for supervising the gathering of materials in response to document requests made by Nintendo?

A. That's correct.

Q. Have you been responsible for assisting Townley & Updike in the preparation of answers to interrogatories?

A. That's correct.

Q. Have you reviewed interrogatory answers as they have been prepared?

A. Yes.

Q. Have you read the trial briefs submitted by the parties in this action?

A. Yes, I have.

Q. Did you read the summary judgment motion filed by Nintendo at or about the time it was filed?

A. I believe I did.

Q. Did you read the response of Universal filed by Townley & Updike at or about the time it was filed?

A. Yes, I did.

Q. Did you assist in the preparation of that response?

A. I did not.

Q. Have you read depositions in connection with your assistance to Mr. Fairhurst in this action?

A. I didn't hear you.

Q. Have you read depositions taken in this action other than the deposition of Miss Sifuentes which you have testified you have read?

A. I have not.

Q. Your deposition was taken recently in this action, wasn't it, Mr. DiMuro?

A. That is correct.

Q. Do you remember when that was?

A. April, April 18.

Q. Mr. DiMuro, during the course of that deposition you remembered writing a memorandum with respect to Universal tours on or about July 27, 1982 advising that the King Kong character is not to be modeled after the ones used in either of the two motion pictures, but rather is to be based upon generic apes or an ape from a zoo or from wildlife.

You remembered during your deposition giving that advice in or about July of 1982, did you not?

A. Yes, I did.

Q. But, Mr. DiMuro, in your deposition you didn't remember whether or not you had given that advice at any time prior to your memorandum of June 18, 1980 and before July of 1982, did you?

MR. FAIRHURST: I'm sorry. Your Honor, I don't understand the question.

THE COURT: Let's have it again.

Q. Mr. DiMuro --

THE COURT: The court reporter can read it.

MR. KIRBY: I'll rephrase it, your Honor.

THE COURT: All right.

Q. Mr. DiMuro, during the deposition which you gave on April 18, 1985, one month ago, you didn't remember, did you, that you had given similar advice to the advice you gave in July of 1982 with respect to tour attractions to anyone else at Universal prior to that date? I'm making the statement you didn't remember, did you?

A. I don't know what you are talking about.

Q. Well, Mr. DiMuro, do you--

A Show me the deposition.

Q. Mr. DiMuro, do you remember being asked this question and giving these answers, page 78, line 5:

"Q. Well, did you have occasion at any point from your June 18, 1980 memo until July 27, 1982, to advise

people at Universal or MCA that the King Kong character was 'not to be modeled as ones used in either of the two motion pictures but rather to be based upon generic apes or an ape from a zoo or from wildlife'?

"A. I don't recall any specific instances where I gave this advice again.

"Q. I am asking prior to July of 1982?

"A. I don't recall."

A. I don't recall.

Q. Do you recall being asked those questions and giving those answers on April 18, 1985?

A. Yes.

Q. Thank you. But you now recall, don't you, Mr. DiMuro, that on April 8, 1982, you advised Mr. Sheinberg himself that RKO owned the visual images and you proposed guidelines or Universal apes, which included that the ape, must be designed as an independent, original creation without reference to stills or reproductions of RKO's apes or DiLaurentiis' ape; is that correct?

A. Right.

Q. And it was after your deposition, wasn't it, Mr. DiMuro, that a copy of the April 8, 1982 memorandum was furnished to Nintendo; is that correct?

A. You will have to ask Mr. Fairhurst. I don't know when it was furnished.

Q. Let me ask you this, Mr. DiMuro: Was it after your deposition on April 18, 1982, that you discovered this memorandum in the files of MCA or Universal?

A. I don't recall.

Q. Do you recall whether you had found it prior to April 18, 1985?

A. I don't recall.

Q. Do you recall furnishing the memorandum at any time to Mr. Fairhurst?

A. I must have furnished it to him in the course of discovery because I was the source of the information gathering, that's correct.

Q. But you sitting here today don't have any memory at all of when you gave him this memorandum from you to Mr. Sheinberg, Defendant's Exhibit 89 in evidence, dated April 8, 1982?

A. Mr. Kirby, I gave him that memo along with innumerable documents. So what are you asking me?

Q. I am asking you sitting here today--

A Whether I recall specifically if I gave him this one document on a particular date, no, I don't.

Q. I am asking you, Mr. DiMuro, so we understand this: Look at Defendant's Exhibit 89. I am asking you sitting here today if you have any memory of when you furnished that document to Universal's counsel in this

proceeding.

A. I have a very clear memory of writing this memo, a very distinct memory of writing it.

If you are asking me the precise date that this document, along with many other documents was given to Mr. Fairhurst, no, I don't remember. But I certainly remember that I wrote the memorandum and that the information was accurate and it was my considered opinion.

Q. Mr. Di Muro, I am not asking you for the precise date.

Let me ask you again: Did you furnish it to him after your deposition was taken one month ago?

A. I don't recall.

Q. Mr. Di Muro, did you have occasion to read your deposition after it was taken?

A. I certainly did.

Q. Did you make corrections on your deposition?

A. I made some corrections, that's correct.

Q. Did you correct what appears on page 78 at line 18 when you made those corrections?

MR. FAIRHURST: Objection, your Honor. When you look at 78 you may see the reason why.

(Continued on next page)

(Record read)

A. Mr. Kirby, it is certainly and obviously implied in this memorandum. All you have to do is read it.

Q. I read it, Mr. DiMuro. I am asking you to point out to me where that concept is embodied in words in this memorandum that you wrote.

A. All right. If I am saying in this memorandum --

Q. Which page are you referring to?

A. Let's start on page 11. If you will read on page 1 the third paragraph, "It should be noted that RKO owns the visual representation of the King Kong ape." That is very clear, precise and concise language. That means that you can't copy the exact reproduction of the King Kong ape, whether it is on a copyrighted still or whether it is in the movie. It is very clear, as clear as daylight.

Q. Mr. DiMuro, do you anywhere in this memorandum advise Mr. Sheinberg, who on April 8, 1982 -- what was his title?

A. Mr. Sheinberg?

Q. Yes.

A. He is president of MCA.

Q. Was he the man who retained you after you faced mandatory retirement at MCA? Did he personally retain you?

A. That is correct.

Q. He is the one who hired you.

When you wrote to him on April 8, 1982 you were writing about a movie, is that correct? Is the subject of this memorandum a movie?

A. Right.

Q. Who was going to produce that movie?

A. Dino De Laurentis.

Q. And you testified, both in your direct examination and in response to questions at your deposition, that King Kong was a project near and dear to Mr. Sheinberg's heart, didn't you?

A. That is correct.

Q. Did you anywhere in this memorandum tell Mr. Sheinberg that you were giving him very conservative advice? Does that thought appear anywhere in this memorandum?

A. Mr. Kirby, you are missing the point of this memorandum and let me explain why.

Q. Please answer the question.

A. No, you are missing the point.

Q. Please answer the question.

A. This memo --

MR. KIRBY: Your Honor, could I please have a direction?

THE COURT: Yes. Of course the question will be answered, but it is not clear that it wasn't going to be answered.

Q. Would you like to have the question read again to you, Mr. DiMuro?

A. Yes.

MR. KIRBY: Would you please read it to him.

(Record read)

A. Mr. Kirby, it is obvious from the tenor of this memorandum that it is a conservative memorandum. Anyone who reads this memorandum and understands it can come to that conclusion. This is a conservative approach to a production matter.

Now let me tell you how this memorandum initiated.

Q. Well --

A. If you will -- you asked me a question and I am going to answer it. I am going to answer the question unless the court prohibits me from answering it.

MR. KIRBY: Your Honor, I would request that the witness be confined somewhat to the questions that I give him. My question asked him, was very particular and asked him whether this memorandum contained anything that said to Mr. Sheinberg --

THE COURT: Yes, I recall it. I think the question has been answered.

Q. Turning to the guidelines that you issued here, looking at paragraph 2, Mr. DiMuro, do these words appear:

"The Universal ape must be designed as an independent original creation without reference to stills or other reproductions of RKO's ape or De Laurentis's ape"? Do those words appear?

A. Do those words appear where?

Q. In paragraph 2 of your guidelines, the first sentence, Mr. DiMuro.

A. The first sentence reads: "The Universal ape must be designed as an independent original creation without reference to stills or other reproductions of RKO's ape or De Laurentis's ape."

What is your question?

Q. I asked if those words appear there. You wrote those words?

A. Of course. It is my memorandum.

MR. FAIRHURST: Your Honor, do we really have to

THE COURT: Now, now, it is cross-examination.

MR. FAIRHURST: I am aware of that.

THE COURT: Yes, all right.

Q. I believe you testified that no one else participated in writing these guidelines other than yourself, is that correct?

A. That is correct, yes.

Q. In the first guideline you say that nobody involved in the movie should even look at the RKO 1933 or

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Son of Kong or De Laurentis's King Kong for any purpose. Didn't you say that?

A. That is what it says.

Q. Didn't you also say that no personnel involved in the production should even read or refer to any publications dealing with the production of RKO or De Laurentis's King Kong?

A. For the limited specific purpose of this memorandum, and you are missing the point, Mr. Kirby, because this memorandum is simply addressed to the issue -- hear me out, please -- does --

Q. I don't think I will have any choice.

A. -- does Universal have to deal with De Laurentis if Universal decides to produce a King Kong motion picture. Now please let me answer the question.

If you will look at the settlement agreement between Universal and RKO you will find the provision which I have quoted here, that Universal will not commence production of Universal's King Kong motion picture unless De Laurentis consents. The background of that is that De Laurentis took the position after doing the 1976 remake that RKO had agreed to give him the additional right to make a second King Kong motion picture, and therefore the premise of this memorandum, Mr. Kirby, is entirely different from the premise of the other memos which I may

have sent advising the corporation as to what we could do with respect to King Kong. This is simply addressed to that one issue: Does Universal have to deal with Dino De Laurentis before it makes its King Kong motion picture. With that context and within those parameters I decided that the conservative approach was to have these guidelines, only for that specific objective.

Q. Mr. DiMuro, do I understand from the extensive answer you just gave that the advice with respect to Universal's use of an ape in connection with King Kong which you rendered in this exhibit, Defendant's Exhibit 89, on April 8, is different from the advice that you rendered three months later in July with respect to the Tours Attractions?

A. Entirely different subject matter.

Q. Is the advice different?

A. I would have to take the two memos and compare them side by side before I could answer that question.

Q. I represent to you, Mr. DiMuro, that what appears right here is a direct quote from what Universal designed the Tours Attraction and that the evidence, as you will see, since you are quoted, says that you are the source of it.

I am asking you right now, Mr. DiMuro, since you have just said that the April 8 memorandum was under unique

circumstances, whether you rendered different advice in July of 1982 than you rendered on April 8 of 1982 to Mr. Sheinberg with respect to how Universal had to create its own ape.

A. Mr. Kirby, let me explain.

Q. Would you please answer that question, Mr. DiMuro.

A. I am trying to, if you will give me a chance. Just let me explain. You have asked me a question now and I am going to answer it.

The April 8, '82 memo was written with a specific purpose and a specific objective in mind. I have said that once more and I repeat it. Therefore, the elements of that memorandum are to be distinguished from a situation where I am giving advice to the tours department, where Dino De Laurentis is not involved, where we don't have a contractual provision to deal with in the June 4, 1980 settlement agreement.

This memo of April 8, 1982 deals with the June 4, 1980 agreement and to the particular contract language that we have to live with. That memorandum over there in July is simply an inhouse opinion from the law department, from Joe DiMuro to people in the tour center as to what they can do with respect to a mock-up that is going to be in the tour center and possibly in the Florida facility, two

entirely different situations.

Q. Mr. DiMuro, was the advice you rendered to Mr. Sheinberg because of the unique circumstances to which you have just testified in April of '82 more conservative than the advice you rendered in July of '82?

A. The memoranda speak for themselves.

Q. I am asking you, Mr. DiMuro. Did you intend to give more conservative advice in April than you did in July?

A. I intended to deal with each problem as it arose, and in my best judgment on April 8, '82 when I was dealing with a contract provision in the settlement agreement, this memorandum was the most honest, the most precise memorandum that I could give to my executive, and the best advice that I could give him. That memorandum was the best and most precise and careful advice I could give to the tour center at that point in time when we had no contractual provision to worry about. We were dealing in an entirely different level, an entirely different situation.

Q. Mr. DiMuro, has your advice since June 18, 1980 with respect to Universal's use of in any way, shape or form, by licensing, in a movie or any other way, of a King Kong ape ever varied or has your position been consistent?

A. Mr. Kirby, I think my position has been very consistent and I think that I have tried a conservative approach to questions that were raised and were posed to me,

and I dealt with each problem as it arose, and on this specific memorandum I have given an answer that we had a particular contract provision that we had to deal with.

Q. Did you in any writing anywhere, beginning with your June 18, 1980 memorandum, advise any executive of Universal or MCA that you were taking a very conservative position with respect to Universal's rights? Did you ever in writing make that statement?

A. No. I am telling you, Mr. Kirby, that I am a conservative man by nature and this is the opinion that I gave and this is the opinion that I thought was a safe and honest opinion to give.

Q. Is the answer to my question no?

A. Did I specifically use the word conservative?

Q. Yes.

A. I don't recall that I did, no.

Q. Did you ever say in words or substance that our rights are actually greater than what I am now advising you but the conservative approach or a safer approach is to proceed along the lines of not in any way modeling it after the RKO or DDL ape?

A. Mr. Kirby, I wrote the memorandum, the various memos I wrote, as precisely as I could and as close to the actual situation that I could get.

Q. Is that your answer to my question?

A. Yes.

Q. Mr. DiMuro, you have testified at some length on direct examination about your involvement in Universal's litigation against RKO, and I assume that is a term you use to refer to the overall cases that were filed, the cases, both the federal case, the state case, the claims and counterclaims that were made by Dino De Laurentis and Paramount and so forth, is that correct?

A. That is correct, yes.

Q. You were the one at Universal who was involved.

A. I was the one who had the responsibility of pursuing the litigation and keeping management advised as to what was happening.

Q. Mr. DiMuro, in that action you reviewed the complaint in the federal court before it was filed, didn't you?

A. Yes.

Q. And I believe you testified that the purpose of filing that second lawsuit in the federal court was to establish that the King Kong story was in the public domain and freely available to all to use, is that correct?

A. That is correct.

Q. And you filed that lawsuit after making an investigation which you have testified about, didn't you?

A. That is correct.

I can't tell you what motivated Gang Tyre & Brown or Rosenfeld Meyer & Sussman to deny these allegations. I don't know the answer.

Q. Mr. DiMuro, you are not denying that you personally are sophisticated in trademark and copyright matters, are you?

A. I don't pretend to be a trademark expert.

Q. Are you a copyright expert?

A. I am versed in entertainment law, Mr. Kirby.

Q. Does that include knowledge of copyright and trademark law?

A. It includes basically copyrights.

Q. I note, Mr. DiMuro --

A. But I don't hold myself out as a trademark expert, Mr. Kirby. Let me make that clear to you.

Q. More expert on copyrights than trademarks, is that a fair statement?

A. No, that is not a fair statement.

Q. Why don't you give me a fair statement?

A. A fair statement is that I am experienced in entertainment law and all the parameters of entertainment law.

Q. And you don't include trademark law within the parameters of entertainment law?

A. Not necessarily. Tangentially there might be

occasions when it becomes involved, yes, but basically we are talking about copyrights, intellectual property.

Q. Mr. DiMuro, perhaps you can enlighten me on this: At the time when Universal was seeking declaratory judgment that it had the right to make the movie King Kong because the story was in the public domain -- that is correct, what I have said so far, isn't it?

A. Because of the probability that the story was in the public domain. That had not been established, Mr. Kirby. That was a theory of the declaratory relief action.

Q. I understand.

If, Mr. DiMuro, as alleged in paragraph 17 of the DDL counterclaim, RKO held a trademark with all that good will and everything else that is described in that paragraph in 1975, then even if the story was in the public domain Universal couldn't make a King Kong movie and call it King Kong, could it?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. It would depend upon the extent of the secondary meaning. I would answer.

(Continued on next page)

you to answer the questions as I put them to you, but you have just testified that you have a different opinion than what Mr. Kroft argued to Judge Real in 1976; is that correct? Is that what I have just heard you say?

A. Yes.

Q. Yes or no?

MR. FAIRHURST: He can't answer the question yes or no, because it hasn't got the time element properly put into it. It's a meaningless question. It's something that would come from Lewis Carroll the way he has just put it.

Q. Today, do you have an opinion?

MR. FAIRHURST: Thank you, Mr. Kirby, now you put it in.

Q. Sitting on this witness stand, do you have a different opinion, Mr. DiMuro, than the statements that Mr. Kroft expressed and made to Judge Real in another federal court; yes or no, do you have a different opinion?

A. I do.

Q. Okay. Now, will you tell me during what year you formulated that different opinion?

A. I don't recall the specific year.

Q. Was it this year?

A. I don't recall.

Q. Was it in 1980?

A. I don't recall.

Q. Do you recall any specific event which might help you recall the time that triggered your rethinking this subject, Mr. DiMuro?

A. Yes.

Q. What was that event?

A. I became aware of the tremendous success of the ET merchandising campaign. I became aware --

Q. What year was that?

A. I don't recall the year.

Q. Was it in the 1980's?

A. I beg your pardon.

Q. Was it in the 1980's when you became aware of the tremendous success of the ET merchandising campaign?

A. That is it came back to me that we had a very successful ET merchandising campaign.

Q. That was in the 1980's?

A. Right.

Q. What year was ET produced?

A. It's been produced within the last five years.

Q. You can't pinpoint it any more definitely for me than 1980 to 1985?

A. I can only tell you that at some point I was aware of the success of the ET merchandising campaign.

Q. Is that the event that led you to formulate an opinion contrary to the opinion that Mr. Kroft expressed in

1976 to Judge Real; is that the event?

A. Well, yes.

Q. Is there any other event?

A. The success that Universal had merchandising Jaws.

Q. When was Jaws produced?

A. Prior to ET.

Q. Do you know was that in 1981?

A. I am not going to speculate. I don't remember exactly.

Q. Do you remember if it was after 1975?

A. Yes, it was after 1975.

Q. Was it before June of 1980?

A. I don't recall the precise date. The Jaws -- Jaws preceded ET.

Q. Looking at the ET merchandising campaign, Mr. DiMuro, how did you learn about the ET merchandising campaign?

A. This was a very successful campaign at Universal.

Q. Did you read about it in the newspaper?

A. I went into the drugstore and you would see an ET item. It's generally known. But it struck me --

Q. I am asking you now, Mr. DiMuro, a specific question, how you became aware of the ET merchandising campaign and I understand you to say that you can walk into

a drugstore. Is there any other way you became aware of the ET merchandising campaign?

A. I was aware that it was a successful campaign because we were doing a lot of merchandising. The company was entering into a lot of merchandising arrangements and I know that it was a very successful campaign.

Q. Do you know what the revenues Universal obtained in the ET merchandising campaign with were?

A. I don't know; I can get them. They were very substantial.

Q. Did you ever know what they were?

A. They ran into the millions I'm sure.

Q. That's your speculation?

A. You asked me for an estimate. I don't know without checking our accounting department.

Q. Thanks, Mr. DiMuro.

Did you work with the merchandising people in the ET merchandising campaign?

A. I did not.

Q. How did you become aware of what the merchandising people were doing with respect to ET?

A. Mr. Kirby, ET was such a fantasticly successful picture and the merchandising was so successful that this is a matter of common knowledge, Mr. Kirby, common knowledge. Anyone in the industry knows this.

UNIVERSAL CITY STUDIOS, INC.

v.

NINTENDO OF AMERICA CO., LTD.

82 Civ. 4259 RWS

May 22, 1985

9:50 a.m.

(In open court)

JOHN V. DiMURO resumed.

CROSS-EXAMINATION

BY MR. KIRBY: (Continued)

Q. Good morning, Mr. DiMuro.

A. Good morning, Mr. Kirby.

Q. You understand, of course, that you are still under oath?

A. I certainly do.

Q. Mr. DiMuro, have you taken the Universal City Studios tour recently?

A. Not recently.

Q. Do you know whether at the Universal City Studios tour this is now a King Kong attraction?

A. I do not.

Q. Have you ever visited the Universal City Florida tour site?

A. I have not.

Q. Do you know whether there is an Universal City King Kong attraction at that tour site?

Let me put in front of you Defendant's Exhibit 93 in evidence. I take it that is the agreement about which you were testifying; is that correct, Mr. DiMuro?

A. This is the one, that is correct.

Q. Which paragraph of that agreement is the paragraph that gave you the right to make a movie involving King Kong substantially similar to the RKO copyrighted 1933 movie?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. Paragraph 6.

Q. And are you referring to the first sentence of paragraph 6?

A. Actually, I am reading the first sentence and the second sentence and interpreting both sentences as a unit.

Q. Do the words substantially similar appear anywhere in paragraph 6?

A. They do not.

Q. Mr. DiMuro, paragraph 6 refers to RKO's covenant not to sue Universal with respect to its making a King Kong motion picture, doesn't it?

A. Yes, it does.

Q. It doesn't refer to anything other than motion pictures in paragraph 6, does it?

A. That is correct.

MR. KIRBY: Your Honor, by the way, this exhibit also appears as Plaintiff's Exhibit 2 as well as being in Defendant's Exhibit 93 which is the Universal/RKO volume where it's tab 20. I apologize for failing to make that identification.

THE COURT: That's all right.

Q. Now, Mr. DiMuro, it's a fact, is it not, despite your interpretation of paragraph 6 with respect to Universal's motion picture rights that that is not the advice that you gave Mr. Sheinberg with respect to an Universal movie on April 8, 1982?

MR. FAIRHURST: Objection. I don't think the question can be answered the way its been put.

THE COURT: Overruled.

A. The April 8, 1982 memo was directed to a specific provision in this settlement agreement and represented my opinion as to how that provision should be dealt with.

Q. And it is not the advice, Mr. DiMuro, is it, that you gave a couple of months later in July of 1982 with respect to Universal City Tours, is it?

A. It is not the same advice; different subject matter.

Q. By the way, Mr. DiMuro, I believe this is clear

from what you have said, but there's no reference in paragraph 6 to Universal's merchandising rights, is there?

A. There is not.

Q. Mr. DiMuro, overnight did you have occasion to find out anything more about the Jaws merchandising program?

A. I did not.

Q. Do you know that Jaws was the fifth largest grossing motion picture of all time?

A. I'm aware that it was a very successful Universal picture.

Q. And you are aware that it had a very successful merchandising program?

A. That is correct.

Q. Are you aware that Jaws was produced and released for distribution in 1975?

A. I was aware it was released before 1980, yes.

Q. My specific question is: Were you aware that it was produced and released in 1975?

A. I did not recall the exact date.

Q. Do you recall it now that I have refreshed your recollection? I am representing to you that it was.

A. I believe that's correct.

Q. Is it your testimony now, with your memory refreshed, that you changed your mind about Mr. Kroft's representations and arguments to the federal district court

A. The Cooper interlocutory judgment was handed down at about the same time as the Universal declaratory relief judgment. That was in 1976, the latter part of 1976.

So the Cooper judgment -- bear in mind, please, there were two judgements involving Mr. Cooper. There was an interlocutory judgment and then sometime later the court wanted to retain jurisdiction to make sure that RKO accounted properly to Major Cooper. There was a final judgment.

Q. You know when that final judgment was entered, don't you, Mr. DiMuro?

A. Sometime after the interlocutory.

Q. It's true, isn't it, as you have just testified, that the only reason the Cooper judgment was designated interlocutory was so that the court with the assistance of a master could determine the damages that should flow to Mr. Cooper?

A. That's correct.

(Continued on next page)

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Q. And the judge didn't change his findings of facts and conclusions of law in connection with that, did he?

A. That is correct.

Q. He just supplemented them with the damage funds?

A. That is correct.

Q. And at the time Universal entered into the agreement with Major Cooper, the Cooper judgment, interlocutory, and the Universal judgment were in effect, were they not?

A. Yes.

Q. And when you drafted or participated in drafting the Cooper agreement, Mr. DiMuro, you knew those judgments were in force, didn't you?

A. I certainly did, yes.

Q. Mr. DiMuro, when you drafted the Cooper Universal agreement with those judgments in force, you knew what the findings of fact and conclusions of law were supporting those judgments, didn't you?

A. That is correct, of course.

Q. That is why, isn't it, Mr. DiMuro, when you drafted the Cooper agreement, participated in drafting the Cooper agreement, you didn't include in there as part of what Mr. Cooper was selling to Universal the word trademark, did you?

A. We included a very generic provision, that Universal acquired all right, title and interest that Major Cooper had acquired under the Cooper judgment, and that judgment was extremely broad because that judgment covered all of the right, title and interest in the name, character and story King Kong, all merchandising rights with respect to the merchandising of the name and character King Kong, and the Cooper Universal agreement took -- Universal acquired under that agreement all of Cooper's rights under that Cooper judgment and any subsequent judgment.

Q. My question to you, Mr. DiMuro, was not that. My question to you was whether or not -- indeed, that wasn't. Let me be more precise. My question was, you didn't include the word trademark in that agreement, did you, the word trademark?

A. The agreement speaks for itself. The specific word trademark is not in the agreement, yes, of course.

Q. And when you say yes, of course, it was because among other reasons that based on Universal's arguments and presentation of evidence Judge Real had found that King Kong wasn't a trademark.

A. Incorrect, not so.

Q. Is it a fact, Mr. DiMuro, that Judge Real found that King Kong was not a trademark?

A. I disagree. Judge Real found that RKO was a

constructive trustee for Major Cooper with respect to all merchandising activities of RKO and that would include the good will generated by RKO over many, many years and would include any trademarks which might have developed from the exercise of those merchandising rights over many, many years. I think that is the only reasonable implication and interpretation of the Cooper judgment, the interlocutory judgment, and that is what we were dealing with when we drafted the Universal Cooper agreement.

Q. You testified yesterday in response to my questions, Mr. DiMuro, that you were aware, and I take it you are still aware today, that the court adopted among its findings of facts and conclusions of law:

"15. There is no evidence that the title King Kong has a secondary meaning by which the public identifies such title with RKO or the motion picture."

And you were aware yesterday that the court had included this language in paragraph 6: "The name King Kong has become part of the ordinary English language."

You are aware of that today too, aren't you?

A. Yes.

Q. And you were aware yesterday and you were aware of it when you drafted the Cooper agreement, weren't you?

A. Yes, sure.

Q. Thank you.

When you drafted the Cooper agreement, Mr. DiMuro, you specifically included in paragraph B of that agreement an acknowledgement that Universal's judgment and findings of facts were in effect, didn't you?

THE COURT: If you want to lead him a little further, look at paragraph 11. Sorry, I couldn't resist.

Q. Would you care to look at paragraph 11, Mr. DiMuro?

THE COURT: I am sure Mr. DiMuro has committed it to memory. I apologize. I just had to prove that despite being late I was awake.

Q. Mr. DiMuro, have you ever drafted a trademark agreement involving the sale of a trademark?

A. I had no occasion to.

MR. FAIRHURST: I have to object to the form.

THE COURT: Overruled.

Q. Have you ever drafted an agreement involving the transfer of a trademark from one owner to another?

A. An assignment of a trademark.

Q. Assignment of a trademark, a transfer, a conveyance from one person to another person. Have you ever drafted one?

A. I was involved in the assignment of the Mego trademark. That went from Mego to RKO and then from RKO to Universal. And I do believe that I was involved in the

transfer of the trademark RKO to Universal.

Q. Did you draft that assignment?

A. I don't recall specifically at this point but I had some involvement with it.

Q. Did you review it if you didn't draft it?

A. Yes. I know I reviewed it and I believe I drafted it. I am not certain at this point.

Q. Any other trademark transfers that you can recall today that you were involved in?

A. No, I don't recall any other assignment involving a trademark.

MR. KIRBY: Your Honor, I would like to have marked as Defendant's Exhibit 104 for identification a letter from Joseph Victor DiMuro to Mr. William Regan, dated December 17, 1982. It is two pages, the second of which is an assignment.

(Defendant's Exhibit 104 was marked for identification)

THE COURT: What is 93 through 103?

MR. KIRBY: Defendant's 93, your Honor, is the large RKO volume.

THE COURT: I know. Why don't I have those?

MR. KIRBY: Your Honor, you should have them. Some of them are the games.

THE COURT: Right. Wait a minute. Maybe I can

work my way through this.

MR. KIRBY: Your Honor, let me give you the list.

THE COURT: No, I think I have got it. I apologize. I am under control. I got it.

MR. KIRBY: It is all in the designation list and most of them are physical.

THE COURT: Right, sorry.

MR. KIRBY: Your Honor, I am putting in front of Mr. DiMuro Defendant's Exhibit 104 for identification, which is Exhibit 80 to his deposition. Your Honor, here is a copy. We will supply one labeled shortly. With your Honor's permission, since we are running short of copies, if I may stand by Mr. DiMuro as we go through this.

THE COURT: Sure.

Q. Mr. DiMuro, would you please look at Defendant's Exhibit 104 for identification and tell me whether that is a letter that you wrote to Mr. Regan and if that is the assignment of the Mego transfer as to which you have just testified?

A. This is the letter I sent to Mr. Regan and this is the assignment that was enclosed with the letter.

Q. I take it from the fact that you sent that to Mr. Regan that your memory may now be refreshed that you drafted that assignment.

A. I believe I did.

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Q. Mr. DiMuro, would you please read the second "Whereas" clause of that agreement out loud.

A. "Whereas Mego corporation has heretofore signed on to RKO General Inc., a New York corporation, of 1440 Broadway, New York, New York, all rights, title and interest in and to said trademark and said registration, together with the good will of the business symbolized by said trademark."

Q. Thank you, Mr. DiMuro. The actual operative paragraph, the assignment, would you please read that.

A. "Now therefore, for good and valuable consideration, receipt of which is hereby acknowledged, said RKO General Inc. does hereby assign on to said Universal City Studios Inc. all rights, title and interest in and to said trademark and said registration, together with the good will of the business symbolized by said trademark."

Q. Thank you, Mr. DiMuro.

Mr. DiMuro, I take it from your testimony, and indeed from my examination as well as yours of the Cooper agreement, that no such language appears in the Cooper agreement, is that correct?

A. That is correct.

Q. When you were drafting this assignment, Mr. DiMuro, did you consult any form books with respect to

transfer of trademarks?

A. I did not.

Q. You drafted this out of your own knowledge?

A. That assignment follows practically verbatim the assignment from Mego to RKO. So all I did was adopt the same language in drafting the assignment from RKO to Universal.

Q. Did you do any research when you followed that other assignment form to determine whether or not this form was an adequate and proper method for transfer of a trademark?

A. I don't recall doing any research.

Q. But it was your opinion that this was an adequate method of Universal securing the trademark for Mego?

A. Yes, it was.

Q. And it is true, isn't it, Mr. DiMuro, that this assignment is dated the 3rd of January 1983, isn't it?

A. That is correct.

Q. And that is 18 months after Nintendo was sued by Universal, isn't it?

A. Let's figure it out, Mr. Kirby. The complaint was filed in June of 1982.

MR. FAIRHURST: Six months, your Honor.

MR. KIRBY: I apologize. I didn't do a very

good job of my mathematics, did I?

Q. That was six months after this lawsuit was filed against Nintendo, wasn't it?

A. I answered the question, Mr. Kirby. The complaint was filed in June of 1982. It would be approximately six months, yes.

Q. You made the arrangements for securing this transfer of registration -- by the way, this was a registered trademark, wasn't it?

A. Yes.

Q. And you made the arrangements with RKO's Mr. Regan for the transfer of this registration, didn't you?

A. That is correct.

Q. When did you first find out that Mego had a registered trademark for a King Kong toy?

A. In the course of discovery in this litigation.

Q. So sometime after June 29, 1982?

A. That is correct.

Q. And prior to that time did you have any knowledge of what trademark registrations there were for King Kong?

A. I don't believe so.

Q. How was it that in particular you came to find out about this trademark in the course of discovery?

A. At some point in the course of discovery I saw

trademark reports which had been requested by, I believe, Mrs. Sifuentes.

Q. Trademark reports on what?

A. On King Kong.

Q. Do you know when those were requested?

A. My recollection is that one was requested in the latter part of 1981, and I think there was a second trademark report in the early part of 1982.

Q. And you weren't aware at the time they were requested that they were requested?

A. I was not.

Q. And you weren't informed of the results of that request?

A. I was not.

Q. Did Mr. Hadl request that you get this transfer of a registration from Mego to Universal?

A. He did not.

Q. Did Mr. Fairhurst?

A. He did not.

Q. But you informed both of them that you had done it, didn't you?

A. I may have.

Q. Let me show you Defendant's Exhibit 104. It shows c.c.'s to Mr. Fairhurst and Mr. Hadl, doesn't it?

A. Then I informed them.

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Q. Mr. DiMuro, let me turn your attention to -- let me withdraw that question and ask you this, Mr. DiMuro: Did you thereafter take steps to acquire any other registrations you became aware of in the course of this litigation for King Kong?

A. You mean any registration of what?

Q. Any registrations for King Kong that you became aware of in the course of this litigation.

A. The question isn't clear, Mr. Kirby. Do you mean a trademark registration?

Q. That is right, a trademark registration.

A. No, I did not.

Q. Did you, at the time you discovered this Mego registration, review Nintendo's interrogatory asking about any registrations for King Kong?

A. I don't recall specifically if I reviewed those interrogatories at that time, no. I did at some point.

Q. Mr. DiMuro, turning your attention to your memorandum of June 18, 1980 about which you testified yesterday, that is the memorandum referred to on this chart under June 1980. You testified yesterday that you prepared that memorandum in response to a request from Mr. Sheinberg, is that correct?

A. That is correct.

Q. I believe you testified that Mr. Sheinberg told

you that he wanted you to advise him as to what merchandising rights Universal had in the King Kong story, is that correct?

A. That is correct.

Q. And it is true, isn't it, that Mr. Sheinberg did not ask you what trademark rights Universal had in Kong Kong, isn't it?

A. That is correct.

Q. And you knew or had testified that Mr. Sheinberg wasn't interested in the trademark when you requested that he inform you as to merchandising rights, isn't that correct?

A. That is correct.

(Continued on next page)

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BY MR. KIRBY:

Q. So it wasn't the purpose of this memorandum to advise Mr. Sheinberg or any other recipient that Universal had a trademark in King Kong; is that correct.

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. That was not the purpose of the memorandum.

Q. Looking at Plaintiff's Exhibit 3, Mr. DiMuro, you simply advised Mr. Sheinberg of what's in that memorandum and nothing more, didn't you?

A. At that time, that is correct.

Q. Did you review Universal's 3 G statement filed in this action? Do you know what a 3 G statement is?

A. I am not sure I know what you are talking about.

Q. Let me show you what is designated Plaintiff's Civil Rule 3 G Statement, Mr. DiMuro. This is a statement required under the rules of this court to be filed in connection with a summary judgment motion and it is supposed to set forth the material facts as to which there are no genuine issues to be tried.

Let me ask you to take a look at that, Mr. DiMuro, and tell me if you reviewed it or participated in any way in the drafting of that 3 G statement.

(Pause)

A I don't recall seeing this statement.

Q. Do you recall seeing it after it was filed with this court?

A. I do not.

Q. Do you recall discussing its contents prior to the time it was filed in this court?

A. I do not.

Q. So, Mr. DiMuro, let me ask you specifically: Did you know that this 3 G statement says: "In June 1980 Joseph DiMuro, an attorney at Universal, set forth in a memorandum for Sidney Sheinberg, Universal's president, the legal basis upon which Universal could claim trademark rights in King Kong."

Did you know that?

A. No.

Q. Now, based on your testimony as to what your memorandum contained, that statement isn't true, is it?

MR. FAIRHURST: Objection.

THE COURT: Sustained.

Q. Now, Mr. DiMuro, in your deposition you testified as to what you meant by merchandising right?

A. Yes.

Q. Can you tell the court what you mean by merchandising right?

A. A merchandising right, as understood in the motion picture industry, is the right to use or to license

the use of a character from a movie in connection with any products such a toys, games, puzzles, posters and to sell and exploit such products.

As I believe I testified yesterday -- and I may not have mentioned this in the deposition -- the character can be either and an animate character like King Kong or ET or it can be a living actor portraying a particular role.

Q. Mr. DiMuro, it's true, isn't it, that in your view a trademark is incident to the exercise of merchandising rights but you start out with the merchandising rights and a trademark can flow from it; is that correct?

A. That's correct.

MR. FAIRHURST: Objection.

THE COURT: Overruled.

Q. That's not what Mr. Sheinberg asked you about, is it, a trademark right or whether a trademark flowed from merchandising rights?

A. No. Mr. Sheinberg asked me if the merchandising arm of Universal could merchandise King Kong and that had a specific connotation and meaning in the industry and I replied to his specific inquiry.

Q. Now, it's true, isn't it, Mr. DiMuro, as you have just testified and explained the term, that the term merchandising rights is not coterminous with trademark

rights?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. Well, in my opinion --

Q. Can you answer that question yes or no?

MR. FAIRHURST: I don't think that's fair, your Honor.

THE COURT: Well, given his expertise, I'll take it.

Q. You go ahead and answer the question, Mr. DiMuro.

A. In my opinion, you have to have the right to merchandise a particular product and once you have merchandised the product and the product is successfully sold and exploited certain goodwill is generated in the minds of the public and trademark rights will evolve from that exploitation, from that advertising and sale of the specific product. This is my view. This has been my view all along.

Q. Okay. Thanks, Mr. DiMuro.

Basically, if I understand your testimony you're saying it's possible for a trademark to evolve from the exercise of merchandising rights; is that correct?

A. Well, you have to sell the product before you develop goodwill.

Q. So merchandising rights first, then maybe a

trademark will develop out of that exercise; is that correct?

A. I think so; that's my opinion.

Q. So it is fair to say in response to my direct question that the terms, as you use them, merchandising rights and trademark rights, are not coterminous?

A. That's my belief and that's my opinion.

Q. Thank you. Now, just so that we continue to have our date sequence in mind, Mr. DiMuro, when you wrote that memorandum on June 18, 1980, the Cooper judgment, the Universal judgment, the findings of fact and the conclusions of law were still extant, were they not?

A. Yes, they were.

Q. And do you know when they were vacated?

A. They were vacated in around October 1980 by the U.S. Court of Appeals for the Ninth Circuit. It issued an order vacating you will all of the judgements in the case, in the declaratory relief action.

Q. Now, you have in front of you your memorandum, Plaintiff's Exhibit 3 of June 18, 1980; is that correct?

A. Yes, I do.

Q. Now, you reviewed a number of documents in that memorandum?

A. I'm sorry.

Q. You reviewed a number of documents in the course

of writing that memorandum, didn't you?

A. Yes.

Q. And you formed your conclusion expressed in your last two paragraphs based on those documents, didn't you?

A. Yes.

Q. What you were advising Mr. Sheinberg, based on those documents, Mr. DiMuro, as I understand it, is that RKO didn't have any more merchandising rights in King Kong, DDL didn't have any more merchandising rights in King Kong, that Cooper didn't have any more merchandising rights in King Kong because of these various agreements and that Universal had superior rights to each of those entities to exercise King Kong merchandising rights; isn't that what you were advising Mr. Sheinberg?

A. Mr. Kirby, you left out the most important element. You left out the Cooper judgment.

Q. I'm sorry, and the Cooper judgment. I didn't mean to exclude any of your document.

A. That's the nut of the whole thing. All of Universal's rights stem from the Cooper judgment and any ancillary judgment and Major Cooper assigned those rights under the Cooper/Universal agreement.

Q. So what you were advising Mr. Sheinberg and what you advised DDL and RKO and so forth is that Universal was going to start merchandising King Kong and they couldn't do

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it any more and your rights were superior to theirs; is that correct?

A. Yes, that is correct.

Q. Did you know at the time you wrote this memorandum of anyone else claiming a right to merchandise King Kong other than the parties you have recited in this agreement?

A. I am not aware of any other claimant, no.

Q. So you were advising Mr. Sheinberg that Universal's rights were superior to any other claimant that you knew?

A. Universal's merchandising rights, that is correct.

Q. Were superior to any other claimant that you knew?

A. Yes, sir.

Q. Did you know, Mr. DiMuro, as part of your participation in production of documents and answering interrogatories in this action, that this memorandum was not produced in discovery until a decision was made to waive the attorney-client privilege in October of 1984; did you know that?

A. You say this memorandum, which one?

Q. PX 3, in front of you, your memorandum.

A. Yes. A decision was made at some point -- I

Q. Thank you, Mr. DiMuro.

I am asking you -- let me put it this way so it is a positive statement: that your advice on the subject of how Universal is to represent an ape in connection with anything it does with respect to King Kong has been the same since June 1980 to the present day, and that advice is reflected in Defendant's Exhibit 79 in July of '82. Is that correct or isn't it?

A. I think we are overlooking a memorandum that I sent to Mr. Sheinberg that you questioned me about yesterday.

Q. Is the advice in that memorandum different -- I take it you are talking about the April 8, 1982 memorandum.

A. Yes.

Q. Is the advice there different about how the ape is to be represented than it is in July of '82?

A. The objectives of the two memos are different.

Q. I understand that, Mr. DiMuro. You have explained that at some length to the court and to me.

A. Yes.

Q. But is the advice the same and has it been the same since June of 1980?

A. I have difficulty answering your question because the objective to be achieved in the two memos is different and therefore the language is not necessarily the

same. That is the best way I can answer your question. In the April 8 memo, if I recall the correct memo, we were dealing with the question as to whether or not Universal had to approach or clear with De Laurentis before Universal made its King Kong picture. That is entirely different from the objective in the July 1982 memorandum to the tour division. So the advice is given in keeping with the objectives of the two memos. That is all I can say.

Q. And it is entirely different from the objective in Universal bringing this lawsuit too, isn't it?

MR. FAIRHURST: Objection.

A. I don't understand your question.

Q. Do you recall having your deposition taken a month ago, Mr. DiMuro?

A. Of course, Mr. Kirby.

Q. I am reading beginning at page 87 from that deposition, Mr. DiMuro. Listen to these questions and answers and tell me when I have finished reading this whether this is the testimony that you gave. You had in front of you at that time this memorandum, Defendant's Exhibit 79:

"Q. Can you read the handwriting? Let me read it and see if you agree to this:

"'peter, I asked Claire to add language that made the ape not look like the King Kong in either movie,

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otherwise okay' and there is a signature which I cannot decipher. Is that what the document says?

"A. I believe so, yes, yes.

"Q. Did you advise or instruct anyone at Universal MCA that the ape would not look like the King Kong in either movie?

"MR. FAIRHURST: The ape in the attraction, is that what you are talking about?

"MR. KIRBY: Yes.

"THE WITNESS: I said that in the Tony Sauber memo.

"Q. In this handwritten note, do you know who wrote that?

"A. On looking at it, Mr. Kirby, I see -- it appears to me that might be Tony Sauber's copy because I see a line. I am just surmising that it might be. I see a line through his name.

"Q. Yes.

"A. I am not familiar with Mr. Sauber's handwriting so I will not speculate as to who made this notation on the memorandum.

"Q. But this notation, I take it from your testimony, is consistent with your advice?

"A. Yes, yes.

"Q. To make sure that I understand this, did

your advice with respect to that topic ever change from June 1980 until the present day?

"A. No. My opinion hasn't changed. I want to make it clear that the intent of this statement in the Sauber memorandum of July 27, 1982 to Mr. J. Stein is that Universal should not copy the precise gorilla that appears in the 1933 RKO motion picture or the 1976 De Laurentis picture.

"Q. I am going to show you what has been marked for identification at trial as Defendant's Exhibit 81, which is a September 23, 1982 memorandum from Alexander to Wesley, and I refer you to the second page of that exhibit under paragraph scope of work, the last paragraph. You then read.

"A. The paragraph beginning

"Q. 'It is understood.'

"A. Yes.

'The King Kong figure shall be an original design based on a living figure. In no event shall the figure be based on the King Kong figure used in any previously released motion picture.'

"Q. Did you suggest that language --

"A. I did not.

"Q. -- be incorporated in the contract?

"A. I did not.

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"Q. I take it that this is an example of the King Kong contract that you did not review.

"A. That is correct.

"Q. Did you ever discuss with anyone at Universal or MCA that the Universal depiction of King Kong should be based on a living ape figure?

"MR. FAIRHURST: I think, Mr. Kirby, that question was asked and answered at least twice in reference to the memorandum that has been marked as Defendant's Exhibit 79 referred to on the chart, the Sauber memo. That is what it says and I think the witness testified that that indeed was consistent with his advice.

"BY MR. KIRBY:

"Q. Do you adopt your counsel's statement?

"MR. FAIRHURST: He is not adopting, he is testifying.

"MR. KIRBY: All right, well.

"MR. FAIRHURST: He testified to that before, Mr. Kirby.

"MR. KIRBY: I am now asking if he adopts your statement.

"MR. FAIRHURST: Fair enough.

"THE WITNESS: Yes, yes."

Do you recall those questions and answers interspersed with amusing interjections by your counsel and

me taking place during your deposition?

A. Yes, I do.

Q. You don't want to change your answer that you gave in that deposition, do you, Mr. DiMuro?

A. No, I don't.

Q. Let me put in front of you a copy of Defendant's Exhibit 79 in evidence, Mr. DiMuro. Please look at the third paragraph of that letter, that memorandum from Mr. Sauber to Mr. Stein. Refresh my recollection, Mr. DiMuro. Did you see this memorandum at or about the time it was written?

A. I haven't finished reading it yet, Mr. Kirby.

Q. I apologize.

A. What is your question?

Q. My question, Mr. DiMuro, was whether you had seen this memorandum at or about the time it was written.

A. No, no, sir.

Q. You do recall having discussions with Mr. Sauber on this subject, don't you?

A. Yes, I do.

Q. Would you please read the third paragraph of Defendant's Exhibit 79.

A. "Joe felt that we would have these rights from our ownership of the book King Kong. If that book is in the public domain as we had previously successfully

asserted, then the rights themselves would be in the public domain."

Q. Is Mr. Sauber accurately reporting to Mr. Stein what you told him in that paragraph?

A. I believe so.

Q. Mr. DiMuro, prior to your deposition being taken in this action you read both volumes of Miss Sifuentes' deposition, did you not?

A. I did.

Q. You didn't read the first volume of her deposition after she gave that, immediately after it was transcribed, though, did you?

A. That is correct.

Q. You read the second volume immediately after it was transcribed, is that correct?

A. That is correct.

Q. When did you read the first volume?

A. I read the first volume immediately before the deposition.

Q. That is in April of this year?

A. The deposition, as you well know, was on April 18 of this year and my testimony is that I read the first volume immediately prior to April 18, 1985.

Q. Mr. DiMuro, you testified yesterday that after this memorandum was disseminated within Universal that you

details and I didn't do it. It was a short conversation, I have testified to what the conversation consisted of and all of these other things were not discussed.

Q. I read your memo. Miss Sifuentes said, "Does it mean we can merchandise?" and you said, "Yes," the end.

A. That is basically what was discussed.

Q. Was there any reason you didn't tell Miss Sifuentes anything about the movies?

A. There was a very good reason, Mr. Kirby.

Q. What is that?

A. The reason is that Universal owns the totality of the merchandising rights and that means they can do anything they want in merchandising short of using an actual copyrighted still of the RKO 1933 movie, be it the still of the gorilla on the Empire State Building or any other copyrighted still from that movie.

Apart from that one qualification, which is an employee right matter, Universal has the totality of the merchandising rights and that means it has complete rights to deal with merchandising as it sees fit.

Q. When Miss Sifuentes called you up to ask you about your memorandum, you didn't think it was important to tell her of course you can't use stills.

A. It was not necessary, in my opinion.

Q. In any event, you didn't tell her?

in response to this memorandum of July 16, 1980?

A. I don't recall any conversation.

Q. Do you recall doing anything to assist her?

A. I do not.

Q. Do you recall making any contacts with RKO or anyone else about getting film clips or anything else from them during this period prior to September 1981?

A. I do not.

Q. But you do recall receiving this memorandum?

A. I do.

Q. I'm asking, Mr. DiMuro, to do your best to tell us whether there was any reason that you can think of today as to why you would not have responded to Miss Sifuentes' memo?

A. No reason that I can think of except if you want me to -- I'm not supposed to speculate. I can tell you as a matter of industry practice getting a copyrighted still of a motion picture is much easier than having the company which owns a particular picture agree to cut out a clip and have that clip used in merchandising or actually used for a television ad. I must tell you that Universal City Studios has a policy against licensing any film clips from its films because it feels that it is helping -- might be helping other producers and we just don't do it.

Q. Okay.

Q. Mr. DiMuro, when you next spoke to Miss Sifuentes, was it after the Tiger license agreement had been entered into by Universal or before?

A. After.

Q. Did Miss Sifuentes have any discussion with you with respect to that license prior to its execution?

A. She did not.

Q. Did she ask you to review the license after its execution?

A. Sometime in early 1982 Mrs. Sifuentes mentioned to me that Tiger Electronic Toys had failed to deliver prototypes, art work and advertising formats for the articles which they were licensed to merchandise under the Tiger Electronics license agreement. She wanted to know if this would be grounds for the termination of that agreement. I reminded Mrs. Sifuentes that in the boilerplate language of the license agreement there is a provision requiring the licensee to furnish the prototypes and the art work and the advertising formats prior to any manufacture or distribution of the licensed articles.

I expressed to Mrs. Sifuentes that in my opinion the failure to furnish these items was a breach by Tiger and that indeed Merchandising Corporation of America had the right to terminate the contract.

Q. That conversation was in May of '82, wasn't it,

Mr. DiMuro?

A. Early '82, yes.

Q. And prior to that time had Miss Sifuentes informed you of the license agreement with Tiger?

A. I believe so.

Q. When do you believe she informed you?

A. Sometime in the latter part of 1981 she asked my assistance in obtaining copyrighted stills from RKO to be used by the Tiger people.

Q. At that time did she tell you about the Tiger agreement, I take it?

A. Yes.

Q. Did you ask her for a copy of the Tiger agreement?

A. No.

Q. Did you ask her why she hadn't consulted with you before entering into an agreement with respect to King Kong?

A. She was not obligated to consult with me. There was no studio policy or studio requirement to that effect.

Q. My question was, did you raise that subject with her? Did you say, Miss Sifuentes, why didn't you consult with me?

A. No, because --

Q. I have heard your answer.

Q. What about during January through March of 1982?

A. The first agreement that comes to mind is the agreement with Coleco which I drafted in May of 1982. Do you want me to go down the list?

Q. In May of 1982, Coleco?

A. That is my best recollection at the moment.

Q. During the period October '81 through May of 1982 when you testified you drafted the Coleco agreement, were you aware of the activity of Merchandising Corporation of America with respect to King Kong?

A. In that period I was assisting Mrs. -- in October of 1981 I was assisting Mrs. Sifuentes to obtain copyrighted stills from RKO and in that connection I contacted Betty Levine of the New York office of RKO for her assistance in obtaining stills for Mrs. Sifuentes, and Miss Levine then contacted Mrs. Sifuentes and delivered some stills which I understand eventually went to Tiger.

Q. Did Universal obtain a license to use those stills from RKO?

A. There was a letter of understanding between Betty Levine on behalf of RKO and Mrs. Sifuentes, which I have seen, which indicated that the stills were being given a license for merchandising purposes and that RKO consented to that particular use of these copyrighted RKO stills.

Q. Any specific merchandising purpose or general

merchandising purpose?

A. My recollection is that the letter was in general terms and did not deal with a specific merchandising project.

Q. Did you, Mr. DiMuro, play any part in the drafting of that letter?

A. I did not.

Q. When did you see that letter last?

A. I have seen it certainly within the last few weeks.

Q. Where did you see it?

A. One of the files that I have.

Q. In your offices in Los Angeles?

A. Right.

Q. Did you produce that letter to Townley & Updike in connection with discovery in this case?

A. I don't recall.

Q. So you don't recall whether you did anything about it, withheld it, gave it to them? You just don't know whether that letter went to Townley & Updike?

A. Mr. Kirby, there was a mountain of documents and I can't tell you off the top of my head if it went to Townley & Updike. If it was part of the material that was asked for it would have gone in the normal course of events.

Q. Do you know whether that letter was produced to

Nintendo America in this lawsuit?

A. I would have to check. I don't recall offhand, no.

Q. But you don't recall any reason why it would be withheld, do you?

A. Of course not.

MR. KIRBY: I will represent to the court that document was never produced.

Q. Mr. DiMuro, did you see that letter of understanding at or about the time it was entered into?

A. I don't honestly recall.

Q. Did you have any discussion with Miss Sifuentes about that letter?

A. At the time that it was written I know that Mrs. Sifuentes got the copyrighted stills and that this letter was part of it.

Q. I asked you a specific question.

A. I am trying to understand your question.

Q. Did you have any discussion with Miss Sifuentes about that letter, discussion, talk?

A. No. I remember telling her that Betty Levine was the person at RKO with whom she should talk. I recall talking to Betty Levine and asking her if she would license or permit us to use the RKO copyrighted stills, that Mrs. Sifuentes would like to have a license on these stills,

like to have them for use in connection with merchandising by Universal.

Following that I have seen this letter from Betty Levine to Mrs. Sifuentes agreeing that this could be done.

Q. You had this one discussion with Miss Sifuentes when she called and asked you about this and you told her Betty Levine is the person to talk to, right?

A. I believe so, yes.

Q. And do you know about when that was?

A. Sometime in October of 1981 is as close as I can come to it.

Q. Did you have any followup discussions with her on that subject or any other subject involving King Kong between October of 1981 up until May of '82 when you testified you had a conversation with her with respect to terminating Tiger?

A. I did not.

Q. None?

A. From October '81 to May of '82, no, I had no conversation.

Q. No conversations with her.

Did you have during that period any conversations with Mr. Steven Adler, her superior at Merchandising Corporation of America, with respect to King

likely that I would be consulted by those people who had knowledge of my involvement going back to 1975 it is also likely that I might not be.

Q. Miss Sifuentes knew about your involvement with King Kong dating back to 1975, didn't she?

A. She was an older employee, yes.

Q. Mr. Adler knew, didn't he?

A. That is correct.

Q. Mr. Sheinberg certainly knew, didn't he?

A. Yes.

Q. Mr. Hadl knew, didn't he?

A. Since he joined the company, yes.

Q. When did he join the company?

A. I don't remember.

Q. Mr. DiMuro, you testified that you had a telephone conversation with Miss Sifuentes prior to her second deposition. Do you recall today whether you called her or she called you?

A. I don't recall who initiated the conversation, but there was a conversation, that's correct.

Q. And in that conversation Miss Sifuentes told you that she thought she ought to be represented by counsel and wanted to know whether Universal would represent her at that second deposition, didn't she?

A. She did.

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Q. And did you tell her that Universal would?

A. I did not.

Q. Did Miss Sifuentes tell you why she thought she ought to be represented by counsel supplied by Universal at that second deposition?

A. She did not.

Q. Did she tell you that she had had to invoke the attorney-client privilege repeatedly on behalf of Universal at her first deposition?

A. She did.

Q. Did she tell you that that was the reason why she thought she ought to have counsel at the second deposition?

A. I believe so.

Q. Did you agree with her that she ought to have counsel?

A. I said I would discuss it with Mr. Fairhurst.

Q. Did you urge her to have counsel?

A. No. I said I would discuss it with Mr. Fairhurst. I took no position on it.

Q. Did you tell Miss Sifuentes in the course of that conversation that she should be loyal to Universal?

A. I did not.

Q. You're lawyer to Universal, aren't you, Mr. DiMuro?

to send a telex, give us some assistance?

A. I know that Mr. Sheinberg did not call me.

Q. Do you recall Mr. Hadl calling you and saying something to that effect?

A. Mr. Hadl did not call me on that subject.

Q. When was the first contact you had with Mr. Hadl in May of 1982 with respect to King Kong?

A. Well, Mr. Hadl asked me to draft an agreement with Coleco industries.

Q. Okay. That was your first contact with Mr. Hadl on the subject of King Kong in May of 1982?

A. Yes, sir.

Q. Had you ever had any discussions prior to that with Mr. Hadl about King Kong?

A. I don't recall any.

Q. Did Mr. Hadl ever ask you to brief him on Universal's rights in King Kong?

A. He did not.

Q. Did Mr. Hadl ever discuss with you any memoranda you had written on the subject of King Kong?

A. He did not.

Q. Specifically, did he ever ask you about your June 18, 1930 memorandum?

A. He did not.

Q. Did he ever tell you that he had recently seen

that memorandum in May of 1982?

A. No.

Q. Did he ever tell you when you were discussing with him the Coleco agreement that he had seen any memorandum that you had written on the subject of King Kong?

A. He did not.

Q. Did he ever ask you to look at the Donkey Kong video arcade game?

A. No, sir.

Q. Did he ever ask you whether Universal had a trademark in King Kong?

A. He did not.

Q. Did he ever ask you whether Universal had a registered trademark in King Kong?

A. No, sir.

Q. When he called you with respect to the Coleco agreement, can you tell me when that was?

A. Sometime in May, early May of 1982.

Q. When you were a consultant?

A. Yes, I have been a consultant.

Q. Since 1977?

A. Since April 1977.

Q. Did Mr. Hadl tell you that he was asking you to do the contract after consulting with Mr. Mittleman?

A. No, sir. We don't operate that way.

Q. Did he tell you why he called you?

A. No, sir.

Q. Were you surprised to be called by Mr. Hadl to draft the Coleco agreement?

A. Not in the least. I testified that I am contacted on an ongoing basis by the top executives in the company. So this came as no surprise and was a perfectly normal practice within the company.

Q. The Coleco agreement is dated May 12, 1982. I take it that Mr. Hadl must have called you before May 12?

A. Yes.

Q. Do you remember whether it was the 1st of May?

A. I can't pin the date down. It would have been prior to May 12th, of course.

Q. What did Mr. Hadl say to you when he gave you this assignment?

A. Mr. Hadl told me that Universal had entered into an agreement with Coleco pursuant to which Universal would covenant not to sue Coleco by reason of Coleco's manufacture and distribution of the Donkey Kong game and in return for this covenant not to sue Coleco had agreed to pay to Universal a royalty of 3 percent of the wholesale sale price of the Donkey Kong game. That was essentially what he told me and he said would you please prepare a covenant not to sue expressing this understanding.

Q. Did he tell you what the Donkey Kong game was about?

A. Not in any detail. We did discuss the game. He described it in some degree, but it was a limited discussion.

Q. Did he ask you to take a look at the game?

A. No, he did not.

Q. Did you ask him any questions about the game?

A. No more than I needed for the drafting of the document.

Q. Did you ask him who manufactured the game?

A. I asked him or he told me that Nintendo was the manufacturer. I don't recall how that information developed.

Q. But you obtained that information in the course--

A Through him, yes.

Q. Did you ask him what Universal was going to do with respect to Nintendo?

A. I did not.

Q. Did he tell you?

A. He did not.

Q. He didn't discuss Nintendo in any way other than learning that Nintendo was the manufacturer of the game that Coleco was going to produce for a home game?

A. Basically, he told me what he wanted in the

agreement and he didn't go into any other detail.

Q. He told you, didn't he, that it was Universal's position that Donkey Kong was an infringement of Universal's trademark in King Kong?

A. He told me, yes, it was our position that the Donkey Kong game infringed upon Universal's rights, yes.

Q. Trademark rights in King Kong?

A. All right.

Q. Is that what he said?

A. I don't recall the verbatim language at this point but he said something to that effect, that's correct.

Q. I'm asking you to the best of your recollection did he say trademark rights in King Kong?

A. The best of my recollection is that he told me that Nintendo was violating, infringing Universal's King Kong rights.

Q. And that's the way he put it?

A. To the best of my recollection.

Q. I understand. That's all you can do, Mr. DiMuro, is testify to the best of your recollection.

Now, did you ask him what rights? That question can be answered yes or no. Did you ask him what rights?

A. No.

Q. Did you ask him if you could be of any assistance in counseling on that matter?

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A. I did not.

Q. I take it he didn't ask you to get involved?

A. He did not.

Q. Did he tell you that he was having discussions with Nintendo?

A. No, sir.

Q. Did he tell you that Nintendo or Coleco had asked for some evidence that Universal had rights in King Kong?

A. He did not.

Q. Did he ask you to prepare any memorandum setting out the source of and extent of Universal's King Kong rights?

A. He did not.

(Continued on next page)

Q. So you went off and drafted the agreement?

A. I drafted the agreement, given the information that he furnished, and submitted it to him.

Q. You testified that Miss Sifuentes asked you about terminating the Tiger license, and you advised her -- you have testified to this several times at some length, about your advice to her on the boilerplate contents of the agreement which gave them the right to terminate because they hadn't submitted the art work.

After that conversation with Miss Sifuentes, when was the next time you heard about Tiger?

A. I believe the next time I heard about Tiger was when I received a copy of a wire from Mrs. Sifuentes to Tiger Electronics terminating the Tiger license.

Q. Do you recall when that wire was dated?

A. The wire, I believe, was dated May 7, 1982 and I received it on May 19, 1982.

Q. Did that wire set out a reason for Tiger's termination?

A. I believe the reason given was the failure to furnish prototypes and art work.

Q. Did you read it when you received it?

A. I read it on May 19, 1982, yes.

Q. Is that wire as to which you are now testifying Plaintiff's Exhibit 17 in evidence now before you?

A. Yes, this is the wire that I received on May 19, 1982.

Q. And you see in that wire, Mr. DiMuro, that at the time the wire was sent Universal had in fact received art work, advertising, promotion, catalog material from Tiger, hadn't it?

A. That is what the wire says.

Q. And you see that the wire says that that material was used without Universal's prior approval, doesn't it?

A. Yes.

Q. The wire also says that:

"The advertising packaging and catalog material which you have prepared and distributed without our prior approval makes clear that the display board and concept of your King Kong mini-arcade table top electronic game is substantially similar to the display board and concept of a popular arcade game called Donkey Kong currently owned and marketed by another company. Under the circumstances, we would not have approved the display board and concept of your King Kong mini-arcade table top electronic game had they been submitted for prior approval and we certainly disapprove them at this time."

Do you see that in this telex?

A. That is what it says.

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Q. And this telex terminated Tiger as a Universal licensee, did it not?

A. I am not prepared to testify as to the legal effect of this telex but it certainly appears to be the intent of the sender, that the contract was terminated.

Q. To your knowledge did Miss Sifuentes have any legal advice in preparing this termination telex?

A. All I know, Mr. Kirby, is that she consulted with me on that one occasion, but I don't know who drafted the document. She signed it. I was not involved in the drafting.

Q. Was May 19 the first time after the conversation you have described and testified to with Miss Sifuentes, the boilerplate conversation, that you had heard anything about Tiger?

A. I don't recall anything else about Tiger in that period.

Q. Do you know why you received this telex on May 19?

A. I don't know any specific reason other than the fact that Mrs. Sifuentes may have felt that since she consulted with me originally that this might be of interest to me.

Q. Did she tell you that Mr. Hadl had told her to send a telex?

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A. She did not, and I was not aware of the transmittal of this telex until I received a copy on May 19.

Q. After you received it did you do anything?

A. I did not.

Q. You had no conversation with Miss Sifuentes?

A. No conversation with Mrs. Sifuentes.

Q. Any conversation with Mr. Hadl?

A. No conversation with Mr. Hadl on this subject matter.

Q. I take it from your testimony, Mr. DiMuro, that you are testifying that you never heard of Donkey Kong until Mr. Hadl called you to his office and asked you to draft a Coleco agreement.

A. I don't recall being aware of it before that.

Q. You don't recall anyone else at Universal discussing that with you?

A. I am sure no one else at Universal told me about Donkey Kong.

Q. After June of 1980 and the settlement agreement with RKO, Mr. DiMuro, had Universal had the occasion to file any lawsuits to vindicate any right in King Kong prior to the lawsuit filed against Nintendo of America on June 29, 1982?

A. I don't recall any lawsuits in that period.

Q. Had it had the occasion to terminate any King

resolution of the dispute. I don't waste an executive's time by asking unnecessary questions. I do what I am supposed to do and if I have a question that I think is relevant then I ask it. Otherwise, I don't bother the executive. He doesn't want to be bothered.

Q. I take it you are telling us that you did know that the dispute had been resolved because of the draft he handed to you?

A. I received the draft. I don't say he literally handed it to me. It probably came in the mail. I looked at it and I either had a phone conversation with him or he may have -- I believe it was probably a phone conversation, that he asked me to look at the draft and get back to him, revise it if I thought it was necessary, which I did.

Q. Did you ask him, Mr. DiMuro, what changes Tiger had made in order to render their game not substantially similar Nintendo's game?

A. No, sir.

Q. Did you suggest that you might review the game?

A. No, sir.

Q. Did you give him any conservative advice about making sure that Universal wasn't permitting a licensee to infringe on Nintendo's copyrighted product?

A. He did not request my advice and I didn't give it. He simply requested that I review an existing

amendment and if necessary in my judgment make any revisions that I thought were indicated, and I am talking now of form and not substance. The substance of the arrangement was set out in this draft memorandum and my task was simply to review that and see if it clearly expressed the points of the draft, the terms of the draft.

Q. Mr. DiMuro, stepping back in time just a little bit, Mr. Hadl had asked you to draft the Coleco agreement which was signed as of May 12, 1982.

A. Right, that is correct.

Q. Was it your understanding of that agreement that Universal was being licensed to produce Donkey Kong products by Universal?

A. You mentioned Universal twice. I am not sure what you mean. Universal as being licensed --

Q. I am sorry, that Coleco was being licensed by Universal to produce Donkey Kong products.

A. No, sir. This was purely a covenant not to sue.

Q. Did you review the interrogatory responses filed in this action, Mr. DiMuro?

A. Which ones?

Q. Let me ask you specifically about the interrogatory responses filed on October 25, 1982, the same year, and the response to interrogatory number 7, which asked in the preface: "Identify all licensees of the name,

litigation from the inception is rather complex.

THE COURT: Even today.

Q. Mr. DiMuro, you also testified in your deposition, page 15, that from 1977 to the present, "Whenever a matter involving the King Kong rights came up I was consulted, whether it came from Mr. Sheinberg or any other executive in the company who might be interested in the rights."

You stand behind that statement you made in your deposition, don't you?

A. I think that is an honest statement of the situation. There may be exceptions but basically the executives know that I have been involved in this matter for many years and they will consult me.

Q. It is fair to say, isn't it, Mr. DiMuro, that just looking at the people like yourself who have offices at Universal, that you are more knowledgeable about Universal's claimed rights in King Kong than anyone else, with the possible exception of Mr. Sheinberg. I will not ask you to testify to superior knowledge to the president.

MR. FAIRHURST: I am going to object to the form unless Mr. Kirby wants to be clear who everybody else is. It has an inherent ambiguity.

Q. I thought I made that clear, anyone who has their office there or works for Universal or the MCA family

of companies as an employee.

A. I think it would be presumptuous of me to take a position there. I have spent time on this litigation as part of my duties at Universal. I have knowledge of the litigation, and I will not presume to say that I am the one at Universal who knows more about it than anyone else. I just can't answer that question.

Q. Is there anyone else that you can think of who might be more knowledgeable?

A. Certainly Mr. Kroft.

Q. I am asking at Universal, Mr. DiMuro. You know what I am asking you.

A. Mr. Kirby, I am trying to answer your question. Now please don't be impatient with me. I am trying very hard to answer your questions.

Q. Focus on Universal.

A. I thought that within the Universal family you would include Mr. Kroft.

Q. I don't.

A. You exclude him, fine. Let's go on from there.

Q. I exclude Mr. Kroft from the Universal family. He is not a day-to-day employee --

A. Mr. Kroft is very closely involved with Universal. He is one of the partners who is involved in litigation on an ongoing basis. He spends a lot of time at

Universal. Let's exclude him. Is there anyone else?

Q. By the way, is your statement still true today about Mr. Kroft, that he is intimately involved with the affairs of Universal, he spends a lot of time there --

A. Litigation.

Q. Is that true today?

A. He is involved in litigation for the studio, that is correct.

Q. May 1985.

A. He has litigation involving Universal City Studios, yes.

Q. Right now?

A. I believe so.

Q. Mr. DiMuro, excluding Mr. Kroft, anyone else who works for Universal that you know of who has more knowledge than you about Universal's claimed rights in King Kong?

A. I don't know of anyone else.

Q. Mr. DiMuro, we know and you have testified that Mr. Sheinberg turned to you to get advice about Universal's merchandising rights in King Kong. That is correct, isn't it?

A. That is correct.

Q. And even though there is dispute about the nature of the conversation we know that you acknowledge that Mr. Miss Sifuentes after receiving that memorandum

called you to ask whether Universal had the rights to merchandise King Kong, isn't that correct?

A. That is correct.

Q. And we know that though there is dispute about when this went on, that Miss Sifuentes turned to you to get help in obtaining stills from RKO about King Kong. That is correct, isn't it?

A. That is correct.

Q. And we know based on your assertions after lunch that you were involved in October of '81 in consulting about the King Kong license, proposed King Kong license to Continental Airlines, weren't you?

A. Yes. I sent a memorandum to Mr. Adler.

Q. Look, Mr. DiMuro, I am just asking were you involved, yes or no.

A. Involved to the extent of bucking the matter to Mr. Adler, period, and that was the end of my involvement. I want to be sure that you understand that.

Q. And you also had an inquiry involving Mr. Goldberger sometime early in 1982 and that came to your attention.

A. Right.

Q. And we know because you testified to it that Miss Sifuentes talked to you about the grounds or at least one grounds for canceling the Tiger license, the only

Universal-generated King Kong license in May of 1982.

A. Yes, yes.

Q. And we know that Mr. Hadl asked you to draft the Coleco agreement.

A. That is correct.

Q. And we know that he asked you to review and revise a proposed termination of the Tiger agreement.

A. Not a termination.

Q. Excuse me, I misspoke. Thank you. A proposed amendment to the Tiger agreement.

A. That is correct.

Q. And we know that you were advised, albeit ten days later, that Universal had canceled the Tiger agreement, right?

A. Yes, that May 19 I received a copy of the wire, yes.

Q. And we know, don't we, that on April 8 of 1982 that you were the one advising Mr. Sheinberg about how Universal should use an ape and design an ape in connection with a proposed movie, is that?

A. No, that is not correct. That memo was addressed to how Universal should deal with the question of whether or not to contact and clear with Dino De Laurentis Universal's proposed production of a motion picture involving King Kong.

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Q. We know that you wrote that memorandum on April 8 and you formulated some guidelines which you attached with that memorandum on April 8.

A. Correct.

Q. And we know that in July you were the one advising on how the ape should look in the tour attraction, right?

A. That is correct.

Q. And we know that in September you at least endorsed the advice with respect to the tour attraction that "the King Kong figure shall be an original design based on a living ape figure."

A. Just hold up a minute. Where are you reading, sir?

Q. I am sorry. I am reading from September of 1982

A. I am not sure if that is my memorandum, but that -- I am wondering if that is the one that Blair Westlake --

Q. That is the same advice, isn't it, that you rendered in July? You didn't change your mind, did you, when you wrote the memorandum in September?

A. I am trying to determine if I changed my mind, Mr. Kirby. You are getting ahead of me. "In no event shall the figure be based on the King Kong figure used in any previously released motion picture."

That appears to be consistent with my advice,

yes.

Q. And we know, don't we, Mr. DiMuro, that one day you happened to be reviewing the King Kong file and you concluded that Universal should get an assignment of the Mego trademark, and you drafted that assignment of that registration, didn't you?

A. Yes.

Q. That was December of '82.

And we know that sometime in the spring of '83 you were involved in drafting a license agreement for Robert Keith for a balloon, weren't you?

A. For an inflatable replica of King Kong, that is correct.

Q. And you testified yesterday that you were involved in working out a license for another inflatable balloon project utilizing King Kong.

A. I advised one of my associates, Mr. Crichen, about the drafting of that document, yes.

Q. And throughout this litigation you have been the person at Universal responsible for gathering documents and other material, looking at interrogatories and generally serving as liaison with your outside counsel, isn't that correct?

A. That is correct.

Q. But your testimony, Mr. DiMuro, is that nobody

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at Universal asked your advice or consulted you in any way with respect to the telex sent to Nintendo on April 28.

A. That is absolutely correct.

Q. And no one asked you to help prepare a chain of titles setting out Universal's rights in King Kong to supply to Nintendo.

A. That is correct.

Q. And nobody asked you to assist in drafting the complaint that was filed against Nintendo.

A. That is correct.

Q. And you didn't review the telex before it was sent, is that correct?

A. The telex to Nintendo?

Q. Yes.

A. I was not aware of it.

Q. Not even aware of it?

A. That is correct.

Q. And you didn't review the complaint before it was filed?

A. I did not.

Q. You weren't even aware of when it was filed, were you?

A. That is correct.

Q. When did you become aware of it?

A. Subsequent to June of '82.

Q. And you didn't have any discussions with Mr. Kroft on this subject, did you, prior to the time the complaint was filed?

A. I did not.

Q. And you don't know anything about whether or not Universal conducted an independent investigation of its rights with respect to King Kong prior to sending the telex, do you?

A. The telex of Nintendo?

Q. Yes?

A. I am not aware of any independent investigation.

(Continued on next page)

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BY MR. KIRBY:

Q. And you are not aware of any investigation conducted between the time the telex was sent in April of 1982 and the time the complaint was filed on June 29, 1982, are you?

A. That is correct.

Q. And Mr. Sheinberg never talked to you about this subject?

A. That is correct.

Q. And when you were asked to draft the Tiger agreement -- amendment. Excuse me. Let me be precise.

When you were asked to review a draft of the Tiger amendment and prepare the Coleco agreement nobody ever mentioned what the plans were with respect to to or Nintendo what was going on with Nintendo at that time?

A. That is a correct statement.

Q. And you never asked anyone what was going on?

A. That's right.

Q. And you never said to anyone in April of 1982, gee, consider my guidelines or consider the memorandum I wrote to Mr. Sheinberg in connection with this Nintendo matter, did you?

A. I wasn't aware of the problem with Nintendo and I think you're mixing apples with oranges because Nintendo has to do with the Donkey Kong game. This has to do with

motion pictures.

Q. By the way, Mr. DiMuro, I take it that you've been involved in at least some of the merchandising activities of Universal with respect to King Kong since December of 1983?

A. Since December of 1983, I don't recall specifically what that involvement would be, but tell me.

Q. I'm asking you, today, do you recall from December 1983 and to today being involved in any Universal licensing of King Kong?

A. Merchandise licensing?

Q. Merchandise licensing.

A. Well, we have carved out the Robert Keith & Company. We have carved out the Phillips organization. Are we excluding the cease and desist letter to Sluggo's?

Q. I don't know. When was it sent?

A. Sometime in 1983. I didn't send it. Mr. Kricun sent it. So those three items. Beyond that I don't presently recall what other involvement I may have had with merchandising.

Q. Let me ask you this question this way: Do you know whether since December 1983 Universal has issued a merchandising license with respect to King Kong, December 1983 until today?

A. Well, I don't know of my own knowledge. But

Q. You have used it?

A. Yes.

Q. Can you tell me what you mean by the term merchandising?

A. I can tell you what I mean. I don't know if it is generally acceptable. I think in my deposition I tried. I can try again. Merchandising rights involve the exploitation, commercial exploitation of any or all elements of a motion picture other than through theatrical or other exhibition, which they are called exhibition rights, and also other than musical rights, which I may have omitted in my deposition. It is toys, games, puzzles. And excluding publishing rights too.

Q. So it would include what you were describing before of RKO licensing before, the activity of RKO licensing, merchandisers, I think you said, to use elements of the King Kong movie on articles.

A. That is right.

Q. Mr. Reagan, do you know if RKO had any standard form agreements that they gave to merchandisers when they did license elements from the King Kong movie?

A. I don't think there was any standard form but as you know, you do one, sometimes you refer to the prior one, modify it, but I don't think there was any standard form, form B 2 or something. It was just a model we would follow,

I suppose, yes.

Q. I am sorry. I thought you said something about exhibition. That wasn't my question.

A. No, I said there was no standard form such as form B 2, but as you do in drafting agreements you look at a precedent and I suppose some of the agreements over the years that followed might come to look like a form.

Q. Did you have any occasion in your dealings with RKO when you were with the Regan Goldfarb firm or now to review any of the agreements that RKO entered into with merchandisers for using elements of the King Kong movie?

A. Yes.

Q. Do you consider yourself familiar with the terms in those agreements?

A. I would have to look at each one, but broadly I might.

Q. Do you have a recollection that there are certain terms that appear in each of the agreements, certain representations by RKO, for example?

A. Generally it will provide that RKO has the right to issue the license that is granted in the agreement, it will provide that trademarks or copyrights will be either in the name of the merchandiser or RKO, but at the end of the license term transfers are assigned to RKO. There will be some provision on what to do with goods that are left

over after the license expires, where they have a period of time to dispose of them. There will probably be a provision not to make any more after a certain period of time so that leftover won't be magnified. There will be provisions for payment. Sometimes there may be a provision for bankruptcy in case the licensee goes broke, so you can terminate. And the normal contract provides provisions of a license for anything.

Q. Have you had any occasion, Mr. Regan, while you were with the Regan Goldfarb firm and up to the present time, to make any investigations of King Kong uses that RKO had not licensed?

A. From what date was that, please?

Q. From the time you were with the Regan Goldfarb firm up until the present.

A. Yes.

Q. You have had that occasion?

A. Yes.

Q. Can you tell me what those investigations consisted of?

A. If someone referred to us, we found ourselves with the use of the character or name King Kong or some element of the King Kong movie which we had not authorized, we would then inquire of the user just to make sure someone had not given them a sublicense from us, and then when we

found out it was not authorized we would tell them to stop.

Q. And were those inquiries and telling the person to stop done in writing or were they oral?

MR. GALLATIN: Your Honor, could we have a time frame to these questions, what period of time prior to 1975? I would like to know if we are going back to 1933 now or what.

MS. FAUCHER: I think we are going back to 1958 when Mr. Regan --

MR. GALLATIN: May we also know when it ends?

MS. FAUCHER: I said up to the present.

THE WITNESS: Is there an open question?

THE COURT: No, I don't think so.

Q. Mr. Regan, were those inquiries in writing --

THE COURT: Yes, there was. I take it back.

A. Yes, generally in writing. I couldn't say if there were some telephone calls. Probably all in writing.

Q. You said that RKO, I believe you said RKO exploited the 1933 movie, has exploited it by theatrical exhibition.

A. Yes.

Q. Has RKO ever licensed other people, given them the ability to also make a King Kong movie based on the 1933 movie?

A. Yes, licensed Dino De Laurentis Corporation to

just a guess.

Q. Can you give me examples of some of the items that Paramount allowed other people to produce using King Kong elements?

A. Yes. There was a Schrafft's candy bar, I think there was a Good Humor. There was also Jim Beam bourbon whiskey, commemorative bottle. Let me think. There were so many of them too.

THE COURT: Who was on the bottle?

THE WITNESS: The bottle was King Kong. It was a bust of King Kong. When you took his head off it poured. I have an untouched one at home.

THE COURT: Pity.

THE WITNESS: It is a pity but I am going to be rich some day with it.

THE COURT: Richer.

Q. Mr. Regan, who owns the copyright in the King Kong Dino De Laurentis move?

MR. GALLATIN: Objection, your Honor. I think we need a foundation as to the competence of this witness to testify to such matters.

THE COURT: Sustained.

Q. Are you familiar with the agreement whereby RKO licensed Dino De Laurentis to make another King Kong movie, Mr. Regan?

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A. That his father, general Cooper, owned the property King Kong and had only licensed RKO in 1932 to make one picture and all collateral benefits, including merchandising rights, publishing rights, belonged to the Coopers, the heir, Major Cooper, including the right to do remakes or sequels of the pictures.

Q. What was RKO's position with respect to Universal and Major Cooper's claims, just briefly?

A. With respect to the Universal claim, action of declaratory judgment, it was our position that the picture was properly copyrighted and the picture was not in the public domain or property.

With respect to Major Cooper, there were two contentions. The work that had been done by his father for hire belonged to the employer RKO Pictures and then, further, he had given RKO Pictures an all-rights agreement, which is a printed form, quite comprehensive, and RKO relied on that also to claim ownership to the picture, the right to do remakes, sequels and all collateral rights including merchandising rights, with the exception of publishing rights which was explicitly reserved by General Cooper in his all-rights agreement.

Q. Before there were any judgements entered in that litigation, did RKO at any time attempt to settle with Major Cooper?

A. Do I have the assignment that I may look at it? I don't know if I made that analysis since the deposition.

Q. Okay.

To try to give you a little more focus, Mr. Regan, let me just remind you that Mr. Gallatin at page 132 asked you to review the document and then he asked you "does this memorandum currently reflect RKO's current understanding and position with respect to its rights in King Kong after the resolution of the Universal versus RKO and Cooper litigation in California?" You responded "No, not necessarily, I am trying to prepare a new one because I never had the Cooper assignment until -- I only got the Cooper assignment recently."

You were then asked "Are there any modifications to this memorandum that you make?" You responded "I really can't tell you. By the next time I will be able to tell you because I would have gotten out the judgements."

I am asking you now do you have any modification to make to Exhibit 97?

A. No, I don't. I don't think I have done any of the things that I said I would, so I can't give any modifications now and I wouldn't without talking to people at RKO.

Q. Mr. Regan, during the period 1980 to 1982, do you know if RKO has received requests from people to obtain

licenses to use King Kong, the King Kong property, either the name or the character?

A. I suppose the time period is difficult for me to tell what time. They have received requests since Universal acquired the merchandising rights, which would be -- yes. The answer is yes.

Q. Do you have any specific requests that RKO has received in mind, since 1980?

A. Yes. There was one to put a big balloon on the Empire State Building from the Keith organization. I don't know whether that request originated with us unless I see my deposition with Universal. There was a proposed advertising campaign I think it was by Continental Airlines and also the printing of a couple of thousand posters by Continental to be given to their employees or whomever.

And then there was a proposed Budweiser beer ad I think to use a caricature, King Kong or the Empire State scene. These are all from my recollection.

All the documents on these, of course, you both have. So it would be more accurate than I am.

Q. With respect to those three circumstances you have just mentioned, the Continental Airlines and Budweiser and Keith, did RKO actually grant any licenses?

A. No.

Q. Do you know if Universal did with respect to any

of those entities?

A. I know the balloon appeared up there, King Kong on the Empire State Building. I assume it was cleared with Universal. But I don't know.

Q. Do you know if in any of those three circumstances RKO referred the request to Universal?

A. I think we may have referred all three of them. I don't really recall. I think we referred at least one. I think we referred the balloons, the Empire State ape balloon to them. I think the Continental. Yes, the Continental, because it had the poster involved. That's two of them. The Budweiser I don't recall. I think that just went away.

Q. Mr. Regan, let me refer you back to Plaintiff's Exhibit 97.

A. Yes.

Q. Have you ever had occasion to relate your views as evidenced in that memorandum to anyone at Universal?

A. I've talked to Mr. Joseph DiMuro.

Q. Under what circumstances have you talked to Mr. DiMuro about the views that you have set forth in that memorandum, Exhibit 97?

A. They are all telephone conversations or perhaps the letter following up. Is that what you mean by circumstances?

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Q. What prompted the telephone conversation?

A. I am trying to recall whether he called me or I called him. The issue would have been what do we do with, for instance, the balloon thing, if I talked to him on that, or the posters, the Continental posters. I think there may have been postcards too that I may have called and talked to him. I don't know who may have initiated the calls. I have no diary entry to help me. I have looked for that.

Q. In these telephone conversations, what was your position with respect to to RKO's rights vis-a-vis Universal's rights?

A. In my opinion, -- I spoke for RKO at the time -- it was that although Universal had merchandising rights, roughly as defined earlier in this testimony, it could not make use of any graphics from the copyrighted original 1933 picture in the exercise of those merchandising rights without the permission of RKO.

Conversely, RKO couldn't put out a game or jigsaw puzzle using those things because that was the merchandising right that belonged to Universal. So as touched upon in this memo we were at loggerheads.

Q. What was Mr. DiMuro's position?

A. He disagreed with me at all times on this point.

Q. How did he disagree with you?

A. In a very gentle voice. He was very gentlemanly

about it. He just said I don't agree with you. One argument that he gave, in addition to the fact he had the assignment of Cooper, the explicit ownership of the merchandising rights, that the position that we took diluted if not frustrated certain exercise of merchandising rights. It might be that Empire State scene that Merchandising wanted and couldn't use it. I was sympathetic to that from a commercial viewpoint. From a legal viewpoint, I thought that Universal did not have the rights.

Q. When you say Universal did not have the rights, what rights do you mean?

A. The right to use anything from the 1933 copyrighted picture.

Q. Anything from the picture?

A. They had a right to use -- none of the graphic elements. But under that ruling all elements in the picture that were in the novel allegedly were in the public domain. So they might have had a right to use part of the plot. They had a right to use the plot anyway, the assignment from Cooper and the court. I am talking about graphic scenes from the picture.

Q. You are talking about --

A Graphics from the picture.

Q. Like stills?

A. No. In a game -- they couldn't use stills. I am talking about merchandising. The simple one is the jigsaw puzzle. Take the Empire State scene and make a jigsaw puzzle out the of.

Q. You are talking about literally the scene as it is on the celluloid of the film?

A. Right, actual graphics.

Q. You are not talking about taking the picture of Empire State Building with that inflatible gorilla balloon?

A. No, right out copyrighted picture, the famous scene that seems to draw most attention from merchandisers.

MS. FAUCHER: I don't have any further questions, your Honor.

MR. GALLATIN: I think we can be very brief, your Honor.

CROSS-EXAMINATION

BY MR. GALLATIN:

Q. Good afternoon, Mr. Regan.

A. How do you do, Mr. Gallatin.

Q. Mr. Regan, I wish you would indulge me and I know you started my education during the deposition about these Hollywood terms and I think you have helped us out today. I would like to ask you again about these so-called merchandising rights. It's my understanding from your testimony here today and from your testimony in your

position and now, if I may put it in the broadest possible way, you worked with the law department, what your relationship was?

A. The law department at MCA and at Universal isn't very neatly structured as it might be at some other companies.

For example, we list on our annual report that our outside counsel, Rosenfeld, Meyer and Susman, which is a law firm in Beverly Hills, is listed as the general counsel of the company.

The house counsel is somebody else, a gentleman named -- at the moment and who was then the house counsel -- Mr. Sheldon Mittleman and he sort of supervises a group of 12 to 15 lawyers who handle mostly the in-house matters involving the pictures and the television series, such as the drafting of the contracts and matters which come up in relationship to those properties.

My own responsibility at the time, as I said, was I originally came in as the person who handled government affairs kind of matters and then was asked to, in a sense, take on this additional responsibility of supervising the company litigation, corporate litigation.

Q. Can you put a date on that, I don't mean an exact date?

A. I believe it was the beginning of 1981.

Q. Up until that time, had you worked with outside counsel for Universal on litigated matters?

A. Not specifically.

Q. Generally, in some way? What I am getting at, when you say not specifically, you mean not on a specifically lawsuit?

A. Not on all the company litigation. I believe at that time we were involved -- the government had brought a major antitrust action against the television networks and we were involved in that and our outside counsel was representing us and I was involved with our outside counsel in that matter.

Q. When your duties changed in 1981 you became responsible for the supervision of outside counsel in outside litigation, did you then have occasion to start dealing with your general counsel more frequently?

A. Yes, I did.

Q. Are there any particular lawyers with whom you have dealt over the years since 1981 on matters at your general counsel's firm?

A. Well, there were many lawyers over there that I dealt with as well as lawyers in other firms all across the country.

Q. Did you deal with Mr. Steve Kroft on occasion?

A. Yes, I did.

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Q. Would you identify him for us, please?

A. Mr. Kroft is a partner in the firm of Rosenfeld, Meyer and Susman.

Q. All right. As of 1981 had you had dealings prior to 1981 with Mr. Kroft?

A. Yes, I believe I had.

Q. What sort of dealings were they?

A. Mr. Kroft was at that time -- I can't tell you the exact status of the case -- was handling the so-called betamax case, which was a case of some notariety which has seen gone to the Supreme Court and been adjudicated.

Q. Did you work with him on that case in some capacity?

A. No, I didn't work with him directly. There were aspects of that case which involved political considerations, such as the congress and I got involved from that point of view.

Q. That was the occasion for your working with him on the case in the broader sense?

A. That's right.

Q. I take it from your answer to one of my previous questions that you yourself did not become involved in the outside litigation that Universal had pending, say for example between 1978 and 1980, if there was pending litigation?

A. That's right.

Q. Were you familiar or were you aware, in the broadest sense of that term, Mr. Hadl, that Universal was in litigation with RKO over its right to make a motion picture, a King Kong motion picture, when that litigation was ongoing?

A. In the broadest sense of the term.

Q. How would you use that term in the broadest sense?

A. I was really not familiar with the specifics of the case.

Q. You were not involved in the day to day activities of the case?

A. Not at all.

Q. Did you have any responsibilities at that time with respect to assisting Mr. Kroft? It's been on the record here that Mr. Kroft was responsible for handling it outside?

A. No, not at all.

Q. Did you work at all in conjunction on that case with Mr. DiMuro?

A. Not at all.

Q. Now, at some point in time, Mr. Hadl, you learned of the product on the market called Donkey Kong; is that correct?

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A. That's correct.

Q. Could you tell us, as best you recall, when that was?

A. I believe it was in early April of 1982.

Q. And how did you come to learn of it?

A. Mr. Sheinberg sent me -- I can't exactly recall what it was but I believe it was rather short, which was either a picture or something -- a representation of Donkey Kong from a trade publication and said would you please look into this.

Q. Do you recall what it is you did?

A. Yes, I do.

Q. Would you tell us?

A. I went home and asked my three children whether they had ever played this game and they indicated to me that, yes, they had. I said I wanted to go and take a look at it and could they direct me to where that would be and the next day we went over to one of the arcade places in Los Angeles and played the game.

Q. you played it. Did you do anything else after playing the game?

A. No. I played it. I must confess I was not very good at it. They were a little better. And I was able to get a little better feel watching them play. I believe I asked them at the time -- I said what they thought, did

they think about King Kong when they were playing it and they said to me, yes.

MR. KIRBY: Objection, your Honor.

THE COURT: Maybe it's expert testimony.

A. I thought it was.

Q. Going back to the instruction -- I'll use the word instruction -- from Mr. Sheinberg to look into it, do you recall whether you were given anything more than just look into this? Was there a request that you report back?

A. I don't remember whether he specifically asked that I report back. I certainly did.

Q. Do you recall what you reported back in substance?

A. Yes, I reported back, I said that I had played the game, that my children had played the game and that I thought we had a claim.

Q. Did you consult with any attorneys at that point as to whether you would have a claim?

A. Yes. At that point I called Mr. Kroft.

Q. What did you tell Mr. Kroft?

A. I told Mr. Kroft that I was -- he was going to have to get a couple of quarters and go play a game.

Q. Did Mr. Kroft subsequently report back to you?

A. Yes, he did.

Q. Do you recall when that was?

A. That would have been within a pretty close time frame, again, within the same period early April of 1982.

Q. When this foray of yours into some arcade to play the game took place -- incidentally, do you recall where that was?

A. Where the arcade was?

Q. Yes.

A. Yes, I do.

Q. Where was it?

A. It was on Pico Bouleard in Los Angeles.

Q. When that occurred, when you were playing the game and you reported back to Mr. Sheinberg and you asked Mr. Kroft to go play the game, were aware at that point whether or not Universal had met with any representatives of Coleco on any matters?

A. No.

Q. Now, when you reported to Mr. Kroft -- excuse me -- when you asked Mr. Kroft to play the game, he subsequently got back to you?

A. Yes, he did.

Q. Did he ever get back to you in writing?

A. No, not that I recall.

Q. Did he get back to you orally?

A. Yes.

Q. What did he tell you?

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when there are outstanding King Kong licensing agreements and there are King Kong activities going on to generate goodwill. Mr. Kroft advised Universal, and they are in evidence now as 92 and 93, in 1980 of Universal's rights to pursue its merchandising rights.

Mr. Kroft was familiar with the RKO litigation and this is not a breach of contract suit, your Honor. It is a trademark infringement suit based on 43 A of the Lanham Act and that's what it started out as. If your Honor wants to take the position that trademark rights are frozen. They are not. They change and they depend on goodwill and all Mr. Kroft would have to know in order to render advice -- he may be wrong with the advice -- all he would have to know is whether there is goodwill to King Kong existing at the time rendering the advice. For a trademark case that will do it, bar nothing else.

MR. KIRBY: Your Honor, indeed Mr. Fairhurst has made my point. Mr. Kroft in these letters in evidence written June 11, 1980, even prior to Mr. DiMuro's memorandum, which Mr. DiMuro testified he discussed with Mr. Kroft and Mr. DiMuro said didn't have anything to do with trademark rights. That was not what Universal's president was seeking from him. He was seeking other type of advice about merchandising.

Universal in this litigation did not file a

merchandising violation claim against Nintendo. It filed an action under 43 A. I agree have few things are actually frozen in time and I guess trademarks conceivably once abandoned, once not transferred, can under very difficult circumstances be restablished. But there's been no foundation, your Honor, to show that Mr. Kroft at this point in rendering the advice that is now being sought to be elicited in testimony from this witness knew anything whatsoever about the status of Universal's rights with respect to a trademark in King Kong or any of the activities of Universal during the period June 11, 1980 up until the time he was sent out to play Donkey Kong.

MR. FAIRHURST: All he had to know was that there was a Cooper judgment.

THE COURT: All right. I obviously have not had an opportunity to read the authorities which you have cited to me and I have a lot of respect for your citations, particularly, given your success in the past. But I think, Mr. Kirby, what I am going to do is the following: My suspicion is, without having read those cases, that they deal primarily with the question of admissibility and perhaps indeed even with a jury case, though I don't know that to be the case. This is nonjury. I fully recognize that the issue of good faith is a key issue, may be a key issue in this. I also recognize everything that you have

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told me about the inadequacies that you believe have been established with respect to any opinion Kroft would render at that time and so, in the classic words that the chancellor uttered probably a million years ago, I will take it for what it is worth.

I am going to overrule the objection.

What did he say?

BY MR. FAIRHURST:

Q. What did Mr. Kroft tell you?

A. Mr. Kroft told me that he also thought we had a claim.

THE COURT: Anything else?

THE WITNESS: I told him to prepare a complaint and to get a telex prepared to send to Nintendo.

Q. Did Mr. Kroft prepare a complaint?

A. Yes, he did.

Q. Did Mr. Kroft prepare the telex that was subsequently sent to Nintendo?

A. Yes, he did.

Q. Do you recall, Mr. Hadl, whether you reported back to Mr. Sheinberg on Mr. Kroft's reports?

A. I believe I did.

THE COURT: Excuse me. Do you know of any other communication that was had with Mr. Kroft on this subject prior to your telephone call?

THE WITNESS: From me or from anybody else?

THE COURT: Anyone. Do you know if he talked to anyone other than you on the subject?

THE WITNESS: I don't know that.

THE COURT: Okay. We'll stand in recess until tomorrow morning at 9:30. I would like to see counsel briefly at the side bar.

(Adjourned to 9:30 a.m., May 23, 1985)

UNIVERSAL CITY STUDIOS, INC.

v.

NINTENDO OF AMERICA CO., LTD.

82 Civ. 4259 RWS

May 23, 1985

9:30 a.m.

(In open court)

MR. FAIRHURST: Your Honor, one minor housekeeping chore. At the end of yesterday I promised a copy of Plaintiff's Exhibit 108 to be added to our booklet. We are fulfilling that sake credit promise.

ROBERT DONALD HADL, resumed.

DIRECT EXAMINATION (Cont'd)

BY MR. FAIRHURST:

Q. Mr. Hadl, when we left off yesterday you had mentioned that you had a discussion with Mr. Kroft after he had looked at the King Kong game and you asked him what his advice was and I believe you said that he advised you that Universal had a claim; is that correct?

A. That's correct.

Q. Immediately after that conversation can you tell us what next occurred as you recall?

A. As I recall, the next thing that happened was Mr. Kroft set about to -- I can't remember whether it was a letter or telex or something for the purpose of finding out who the company was, where it should be sent. The next

thing that happened after that most immediately, I recall having conversation with Mr. Sheinberg.

Q. What occasioned your conversation with Mr. Sheinberg?

A. Mr. Sheinberg had had apparently a meeting with a Mr. Greenberg. Mr. Greenberg was and I think still is the president and chief executive officer of Coleco.

Mr. Greenberg had apparently come to Universal for this lunch which I think had been arranged by Mr. Adler, by the way, of which I did not know anything until after the lunch occurred. I was not involved in any way. It was a business lunch.

Q. You learned about this luncheon after the actual fact of the luncheon?

A. That's right. The key thing I remember about it was Mr. Sheinberg called me or I went to see him and he said to me he had this lunch with Mr. Greenberg. He had learned that this very same game that we were concerned about, Donkey Kong, was going to be brought out in a home video version, that Coleco was, in fact, the licensee, that he had told Mr. Greenberg at the lunch about what our concerns were and Mr. Greenberg's response to him was -- and I remember -- "what took you so long?"

Q. Mr. Sheinberg reported this to you?

A. Right.

Q. After that report from Mr. Sheinberg, did you have any subsequent discussions with Mr. Kroft about what was then evolving as the Donkey Kong/King Kong claim?

A. I think within 24 or 48 hours after that conversation I was in touch with Mr. Kroft again about where was the complaint, where was the letter, what was going on and we now learn that not only was it Nintendo that we were concerned about but that Coleco was in this picture and that we felt, again -- Mr. Greenberg's remark was further support that here was somebody who was taking our property.

So what we did was we then sent out a telex.

Q. Let me show you what has been offered and accepted in evidence as plaintiff's Exhibit 14 and ask you if that is the telex to which you referred?

A. Yes, that's the telex.

Q. Did you see this telex before it was actually sent out?

A. Yes, I did.

Q. Who prepared it?

A. Mr. Kroft.

Q. Do you recall whether you discussed the contents of the telex with Mr. Kroft after he sent it to you?

A. Yes. I think we would have talked about the contents. As I recall, and I have looked at this again

recently in preparation for this trial, I recall talking with Mr. Kroft a lot about how much time we were going to give them to respond. I think there was some concern about that. I remember we agreed on that. Then it went out over Mr. Sheinberg's signature and I think the important point was that it also went to Coleco. It didn't only go to Nintendo at that point.

Q. Do you recall when you had this discussion with Mr. Kroft over the timing of it, whether this was a telephone conversation with Mr. Kroft or was he physically at Universal when you were discussing it with him?

A. I think he probably sent me a draft and I probably talked to him on the telephone.

Q. Do you recall at that time whether you asked any questions of Mr. Kroft with respect to the matters that are actually set forth, the references to the basis upon which Universal claims its rights?

A. I think that with respect to my understanding about the rights in King Kong I would have to describe it as an evolutionary kind of situation. I think up until this point, when the telex went out, my conversations with Mr. Kroft, to the extent they involved rights, were really directed toward whether we felt that Donkey Kong was an infringement of King Kong. He and I were not talking about at that point whether we had rights, whether there was a

good chain of title.

I took it on faith from him and it was subsumed in the conversations we had the rights. The only question was whether in Mr. Kroft's mind and in my mind there was substantial similarity here, whether or not the articles were -- the two things were very much the same and it was on that issue I recall I felt very strongly about it.

He wasn't as strong as I was but he certainly felt we had a claim.

MR. KIRBY: Your Honor, may have a continuing objection on the same basis as yesterday?

THE COURT: Yes.

MR. KIRBY: Thank you, your Honor.

Q. Once you learned from Mr. Sheinberg that he had met with Mr. Greenberg of Coleco and got back with Mr. Kroft about the telex and to add Coleco to it, correct?

A. Yes, that's correct.

Q. What next do you recall in the chain of events? And I am going to try to give you a date to fix it by so when we proceed further that we do have some reference. It's been established on the record that Mr. Sheinberg's luncheon with Mr. Greenberg was on April 27 and the telex of course was April 28th. Using that as a benchmark, if I may, what next occurred after that?

A. I think the next thing that happened was --

there were a couple of things that happened almost simultaneously.

After Coleco got the telex they were in contact with us and Mr. Schwefel, who was a lawyer for Coleco and I were charged with the responsibility of seeing whether we couldn't resolve the matter.

At the same time, preparation was made to see whether the parties couldn't get together to resolve it, that is, people from Nintendo, people from Coleco and people from Universal. And in fact such a meeting did occur.

Q. Did you arrange that meeting?

A. I believe Mr. Schwefel and I were involved and I can't recall whether or not I actually talked with Mr. Lincoln at that time before the first meeting in my office. I may have.

Q. Did you call Mr. Schwefel or did he call you, if you remember?

A. Well, I think as a result of the lunch Mr. Sheinberg had with Mr. Greenberg and when they received the telex I believe they called us.

MR. KIRBY: Your Honor, I object and move to strike. I think we've had too much of what the witness thinks may have happened and we are not getting anything other than speculation. He should answer the question if

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he can and if he can't he should not and he not speculate and I request that you so direct him.

THE COURT: You are so directed, Mr. Hadl.

Q. In any event, whether Mr. Schwefel called you or you called him, you had a conversation with him; is that correct?

A. That's correct.

Q. What occurred as a consequence of that conversation?

A. We resolved the claim that we had vis-a-vis Coleco.

Q. Did you resolve the claim that Universal had vis-a-vis Coleco during that conversation with Mr. Schwefel or subsequently?

A. There were a series of conversations.

Q. What next after the first telephone conversation with Mr. Schwefel, what's the next event that occurred?

A. After that we had the -- it's hard for me to put it exactly in context. The meeting occurred on May 6.

Q. When you went to that meeting, did you have anyone with you representing Universal?

A. Yes.

Q. Who was that?

A. Mr. Kroft.

Q. It was you and Mr. Kroft from Universal?

A. That's correct.

Q. And Mr. Schwefel from Coleco?

A. That's correct.

Q. Anyone else?

A. I believe he had counsel with him.

Q. Do you remember who it was?

A. The firm was Kaye Scholer. I don't remember all the other names. It was somebody from that firm.

Q. What about Nintendo?

A. I believe Mr. Arakawa was there, Mr. Lincoln was there and I believe there was another gentleman.

Q. Mr. McGee?

A. Yes, Mr. McGee.

Q. You had not met any of those persons with the exception of Mr. Kroft before; is that correct?

A. That's correct.

Q. At this meeting on May 6, can you tell us in substance what occurred?

A. The point of the meeting was -- we had sent this telex and the point was to see whether or not the parties could come to some agreement to resolve our claim.

Prior to the meeting, as I have indicated, we had come to an understanding with Coleco. That understanding was later embodied in an agreement. So Coleco came to the meeting with the knowledge that they had

resolved their claim with us and the issue was whether or not we could also reach an understanding with Nintendo.

Q. And would you tell us in your own words what progress, if any, was made in reaching an understanding with Nintendo?

A. Well, there was no progress with Nintendo. To get to the end of the meeting, they left the meeting, as I recall, saying that they would consider the matter and get back to us.

Q. When you went to that meeting, Mr. Hadl, did you have an understanding as to whether Universal or Merchandising had entered into any licensing agreements with anyone else over King Kong?

A. Well, what also occurred during that week period of time was that it came to my attention that Merchandising had given a license to another company involving King Kong and that other company was Tiger Electronics.

Q. How did that come to your attention?

A. It came to my attention from Mr. Adler.

Q. Who is Mr. Adler?

A. Mr. Adler worked for as was I believe a vice-president of Merchandising Corporation of America.

Q. How did it come to your attention; what did he do?

A. Well, to put it the best way I remember, there

had been this luncheon with Mr. Greenberg. Mr. Sheinberg had come away from the luncheon disturbed because Mr. Greenberg had said to him, you know, what took you so long, as though we had been asleep at the switch and not going after someone who was invading -- taking our property.

During this period -- I guess it's about a week period or 10-day period -- we had conversations with Coleco, came to some understanding with them and then found that Mr. Adler whom -- I recall that he had advised Mr. Sheinberg at the time that there were no outstanding licenses involving King Kong and the home video area and during this 10-day period he all of a sudden remembered, ah-hah, about 8, 9 months ago, he did give a license to somebody in the home video area.

As it turned out, this was an exclusive license for home video rights in King Kong and that was very upsetting and disturbing to us because it then appeared that he had given away what we regarded as a very valuable property and that this might impede our ability to make the arrangement with Coleco and Nintendo.

Q. Were you given any specific assignment by Mr. Sheinberg to resolve this matter?

A. I don't know that it was specific. It was clear that's what my job was.

Q. You were brought in to handle it in some way and

resolve the problem?

A. I was handling this matter to start with. It went with the territory.

Q. Can you tell us what you did at this time? Now we are moving on several planes simultaneously. If I may focus on the Tiger plane, if I may call it that, what did you do initially after you learned of the fact that Merchandising had entered into this licensing agreement with a company called Tiger Electronics?

A. Adler came to me and said, yes, we have made this deal and we have not heard anything from them. I think under our agreement we can terminate it because they have not sent us any material. We have not seen a thing. Adler immediately prepared a telex to Tiger saying that I believe your license is terminated because we have heard nothing from you and also you haven't come to us for the necessary approvals, which are required under the agreement and, therefore, the license is no longer.

Q. I am going to show you what has been marked as Plaintiff's Exhibit 15 and ask you if you can identify Plaintiff's Exhibit 15 for us?

A. Yes. This was the telex and I remember that it was prepared by -- it may have been prepared by Miss Sifuentes for Mr. Adler, but it went out from their department.

Q. After you learned of the existence of this Tiger agreement, did there come a time when you spoke about it directly with Miss Sifuentes?

A. Well, I think that I was speaking about it with her at the time this went out. I think I was aware of this telex. I think the next thing that happened was Tiger responded to this.

MR. KIRBY: Objection, your Honor, move to strike.

THE COURT: It will be stricken.

Q. Do you recall specifically? You are using the construction "I think." Can you tell us what actually occurred?

A. Yes. What happened after this telex went out I was advised that we had received a response and that Tiger had submitted some materials in response.

Q. Did there come a time, Mr. Hadl, when you yourself saw the materials?

A. Yes, there did.

Q. Let me put in front of you what has been identified and marked as Plaintiff's Exhibit 16 and 53. We have two separate exhibits.

MR. FAIRHURST: Just so the record is clear, in what I am showing the witness and what's on the record here, 16 is a covering letter from Randy Rissman of Tiger to

Loretta Sifuentes and dates dated May 5, 1982. That's all Plaintiff's Exhibit 16 is.

Plaintiff's Exhibit 15 is the same letter but annexed to it in the form that I am going to show the witness are various materials referred to in the letter itself. This is the original letter and the original materials.

Q. I'm going to ask the the witness to put both of them in front of him.

MR. FAIRHURST: We have furnished counsel for Nintendo with copies. This is the original. The copies they have are not in the colors and so forth. I am going to ask Mr. Hadl just a few questions about that.

Q. Mr. Hadl, can you identify Plaintiff's Exhibit 53 for us?

A. Yes, I can. This is the material we received.

Q. When that material was received, did you yourself review it?

A. Yes, I did.

Q. Going through it, can you tell us what specifically you reviewed?

A. Well, I reviewed the material that's in this exhibit and it appears to be promotional and advertising and other material. They have described it here in the letter, which was to go along with their game.

Q. Did you form an opinion about that material at the time?

A. Yes, I did.

Q. What was your opinion?

A. After looking at this material -- there were a variety of things. Tiger had a license to do a home video game I believe and then a tabletop game and something else. The main thing I focused on was the home video game.

Q. What specifically about it?

A. When I looked at the packaging or art work for the home video game I got very concerned that it looked very much like the Donkey Kong game.

Q. When you say the Donkey Kong game, you are referring to the video arcade game that you had seen and played; is that correct?

A. That's correct.

Q. What is it that alerted your attention specifically?

A. What was of concern to me they had certain ladders which looked like they were similar to the ladders in the Donkey Kong arcade game. Be there was something at that time called the jump button or something which the character jumped and it looked to me like there was going to be something like that and it looked to me like there was a gorilla on top of the building. I was very concerned

would hold up in terms of terminating that license. I am not all that familiar with that area of the law. There was some argumentation that if they came in with the approvals and they came in with the art work that you might then still have the license.

When we saw the material, however, when we finally did get the material, it then struck me that there was a much more critical problem involved with Tiger than merely that and that was that notwithstanding that we had the right to give them the King Kong rights they had no right to take those King Kong rights and then somebody else had a game out there, even though we were suing them and potentially copy what that person had in terms of a video display and that became my principal concerning and I think that's what expressed and articulated in this letter -- in this telex.

Q. When you first learned that the Tiger agreement had been entered into I believe you said it was from Mr. Adler?

A. Yes.

Q. Did you have a conversation with Miss Sifuentes about that as well?

A. Yes.

Q. And did you?

A. Yes.

Q. What can you tell us about that conversation?

A. What I remember about that conversation is that I asked her and I believe as I asked Mr. Adler, how could they have licensed this very valuable property in a media which was at that point emerging and was becoming and enormous business for such a small amount of money and given away those very valuable rights when they made the deal they did.

Q. Let me ask you, Mr. Hadl: Did you express upsetment?

A. Upsetment?

Q. With Miss Sifuentes during that meeting.

A. Yes, I did.

Q. Would you tell us how you expressed your upsetment?

A. Just by saying -- I was angry.

Q. Did you have a discussion with Miss Sifuentes at that time about the underlying basis of Universal's rights in King Kong?

A. No.

Q. Did there ever come a time in your dealings with Sifuentes in conjunction with King Kong and Donkey Kong in which you had a discussion with Miss Sifuentes about the underlying basis of Universal's rights in King Kong?

A. No.

Q. Do you recall, Mr. Hadl, when you and Miss Sifuentes first became involved in any discussions of any kind about King Kong and Donkey Kong?

A. Well, the first I would have been with Miss Sifuentes about King Kong or Donkey Kong would have been with respect to the Tiger matter.

Q. You had no prior discussions?

A. No. What happened after -- again, there were a couple of things going on simultaneously. This telex is dated -- I don't see it. What was the date?

Q. It's on the top -- 5-8-82 -- first line.

A. And within a week or so -- I was also talking to Mr. Schwefel at Coleco -- I had advised him about the Tiger matter. In fact, I believe I advised him about the Tiger matter before he came to the meeting on May 6. And so he and I were talking about this and at the same time I was having prepared the agreement with Coleco about which we had reached an understanding. Again, Nintendo not being within that at that moment, they had gone back to Seattle I guess and they were considering it.

Q. Did you tell Mr. Schwefel of Coleco about the Tiger agreement prior to his coming coming out to Universal on May 6?

A. My best recollection is that I did.

Q. So, in other words, at the meeting of May 6 Mr.

Schwefel knew about the Tiger agreement?

A. Yes, to the best of my recollection.

Q. Did you advise Mr. Kroft of the Tiger agreement?

A. Yes, I did.

Q. You advised Mr. Kroft of the Tiger agreement prior to the May 6 meeting?

A. Yes, I did.

Q. What did you tell Mr. Schwefel about the Tiger matter when you first told him about it?

A. I told Mr. Schwefel that I discovered that we had a license with someone else, that we were -- and that we were trying to get out of it.

Q. Did you tell him it was embarassing?

A. Yes.

Q. Did you tell him that Mr. Sheinberg had been upset to here about it?

A. Yes, I did.

Q. What do you recall happening after the May 6 meeting in conjunction with this evolving series of events over Donkey Kong and King Kong?

A. Well, the way things ultimately terminated -- if I can jump ahead and jump back if you like -- we had worked out in principle an agreement with Coleco before they attended the meeting and that agreement was that we would give them a covenant not to sue and they would, in turn,

pay us a royalty of 3 percent.

Q. Was that a negotiated royalty?

A. Yes, it was. We asked them for a good bit more.

Q. Do you remember what you asked them?

A. I remember we asked them for between 7 and 10 percent.

Q. Can you tell us now what Universal's standard, if it had a standard rate, its royalty rate was for licensing--

A Things were evolving again. That was within the 30 days of the motion picture ET was released that had a major impact in the industry on what merchandising licensing rates were. At that time 7 to 8 percent was a fairly standard rate. After that time I think it went much higher.

Q. So you wound up with a royalty rate on the Coleco of 3 percent?

A. Yes. I believe that the way we worked it out, as I said, it got started because Mr. Greenberg has a lunch with Mr. Sheinberg. That lunch was to discuss general overall business matters. Coleco had been a licensee of Merchandising, had had some products and they were anxious and interested in doing more things with us.

Q. How did you come to understand the purpose of this lunch that Mr. Greenberg and Mr. Sheinberg had?

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A. This is after the lunch.

Q. Who told you about the dealings?

A. Mr. Sheinberg. I think how we arrived at the -- your question about how did we arrive at the 3 percent rate, we arrived at the 3 percent rate as a rate on which the one hand it was Coleco's recognition that our product was being taken here and giving us something for that and on the other hand our agreeing to a rate which was not going to -- which was going to let them go about their business.

MR. KIRBY: Your Honor, I move to strike that answer.

THE COURT: It will be stricken.

A. I'm sorry. I keep saying "we believe."

Q. Can you testify to what you are testifying as your own personal knowledge of the series of events that occurred?

A. Yes. That's my knowledge and I made the agreement with them at 3 percent for those reasons.

Q. During the course of this you said you made the agreement. Did you physically do the drafting of the Coleco covenant not to sue?

A. No, I asked Mr. DiMuro to prepare it for me.

Q. Do you recall when you asked Mr. DiMuro to prepare it?

A. It would have been after the meeting of May 6.

draft that Mr. DiMuro sent you? Compare 109 with 110.

A. 110 is a memo to me which says "I reviewed your redraft and think your revisions are fine," so I guess I made some revisions.

Q. Do you remember what they were?

A. I would have to study them.

Q. Would you please do so?

(Pause)?

A. There is a paragraph in the original draft he prepared that is taken out of my revision.

Q. What paragraph is that?

A. Paragraph 5. Paragraph 5 of -- I guess this is 109.

Q. Paragraph 5 of 109 was taken out and 110 is the result of that having been deleted, is that correct?

A. That is correct.

Q. Can you tell us why you took paragraph 5 out of 109?

A. Paragraph 5 refers to a pending application by Universal for registration of trademark King Kong in international class 9 and says Coleco agrees to take no action which may hinder or prevent the registration of such trademark in the name of Universal.

Q. Can you tell us why it was taken out?

A. Yes. It also came to my attention at that time

that Mr. Adler had sought to register the trademark King Kong in the trademark office, and I pursued that to inquire as to what the basis of that was, and discovered that it was based upon a procedure in which they took some wrist watches and put a King Kong name or stamp on them and then took them up to someplace on the Universal property, and sold them in interstate commerce.

It came to my attention the law in this area was evolving, and there was some question as to whether that was a valid use which would form the basis of a trademark registration, so I took this out because it was my intention to not further -- to not go ahead with that trademark application considering what I thought was a potential for a questionable basis for that application.

Q. Thank you.

Now, do you recall, Mr. Hadl, whether when you instructed Mr. DiMuro to prepare a draft you gave him any description of the Donkey Kong arcade game?

A. I don't recall that.

Q. Can you tell us when it was in your mind that you had negotiated the essential terms of the agreement with Coleco in that covenant not to sue?

MR. KIRBY: Asked and answered.

THE COURT: Sustained.

Q. Coleco eventually signed the covenant not to sue?

A. That is correct.

Q. I direct your attention to Plaintiff's Exhibit 19. Is that the signed agreement?

A. Yes, it is.

Q. And you notice the date of 19, Plaintiff's Exhibit 19?

A. Pardon me?

Q. You notice the date at the top of Plaintiff's Exhibit 19?

A. Yes. It says May 12.

Q. Had the terms of the agreement been essentially agreed upon before the actual document was signed?

A. Yes, they had.

Q. That is all I am trying to get at. Yes, they had?

A. Yes, they had.

Q. All right.

Now, do you recall, Mr. Hadl, whether at this time -- when I say "This time" I use the period between May 6 and May 19, in that period -- whether you received any memoranda from Ms. Sifuentes on the subject of King Kong?

A. Yes. I received from Ms. Sifuentes --

Q. Please continue the answer?

A. I received a package of material from Ms. Sifuentes.

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Q. Let me put in front of you what has been put in evidence as Plaintiff's Exhibit 54.

A. Yes. This is the package of material. I might say that I don't have now any present recollection of having received it at that time. I have looked at this in preparation for this trial, and can't remember specifically at the time that I received it -- I have looked at it and note that she just says she is sending me some memos, and I don't recall that it was in specific response to something I had asked her to do.

Q. Is it your best recollection that you received this at the time without having specifically asked her to do anything?

A. That is correct.

Q. And then you got it, and I assume you looked over the materials?

A. Yes.

Q. Did you have a discussion with anyone about the contents of Plaintiff's Exhibit 54, and so we are clear by "Contents" I mean any of the exhibits, memos, letters, attached to the covering memo, which I will read into the record.

It is from Ms. Sifuentes to Bob Hadl, May 12, 1982:

"I am enclosing several memos from Joe DiMuro

regarding King Kong merchandising. Please note the initial memo of June 18, 1980 to Sid Sheinberg. My recollection is that after this was received Sid Sheinberg spoke to Steve Adler and instructed him to license King Kong. On July 1, 1980, Steve Adler sent me a memo requesting discussion of King Kong licensing."

That is the covering memo. Did you have a conversation with Ms. Sifuentes as a consequence of receiving that memorandum?

A. Not that I recall.

Q. Did you have a discussion with Mr. DiMuro as a consequence of receiving that memorandum?

A. Not that I recall. This is dated May 12. At the time Mr. DiMuro and I were talking about the Coleco covenant not to sue.

Q. You don't recall specific discussions with Mr. DiMuro about the contents of any of those memos?

A. Not that I recall.

Q. Did you read the memorandum from Mr. DiMuro to Mr. Steinberg to which Ms. Sifuentes adverts in the second paragraph of her memorandum?

A. I can't tell you that I read it at that time. I have since read it. I don't recall that I read it at that time.

Q. Okay.

Now, so we can switch back to another plane to keep the chronology going, if I may state it that way, after you had sent Tiger the telex on May 8, did there come a time when you had a meeting with Tiger?

A. Yes. There came a time. What happened --

Q. Well, let me do it so the record is clear, Mr. Hadl. When did that happen, sequentially, irrespective of the date?

A. What I was going to say is after we sent them the telex -- I'm trying to recollect -- I believe the next thing that happened was they sent us a series of letters after we sent them that second telex that we are referring to.

Q. Let me put in front of you what has been marked as Plaintiff's Exhibit 21 A. I will first ask you to read Plaintiff's Exhibit 21 A.

(Pause)

A. The first paragraph?

Q. No. I want you to read the entire paragraph to yourself rather than burden the court with this.

(Pause)

A. I have read it.

Q. Does that refresh your recollection as to when you had a meeting with representatives of Tiger on this matter of termination of their license agreement?

A. Well, it says here, "I told you last week." I am hazy --

MR. KIRBY: Objection. The question was does it refresh your recollection. I think from the record we are entitled to an answer to that.

A. I am unclear, Mr. Fairhurst, as to whether I had a meeting with them before they sent me the letters of May 18. I very vividly recollect a meeting after that. This does not refresh my recollection that we had an actual meeting or they were present in my office.

Q. But at some point you did have a meeting with them, is that correct?

A. Yes, that is correct.

Q. Can you tell us, as best you can recall, how that meeting came about?

A. The meeting came about because after we sent them the telex saying that, "We think that your game looks very much like the Donkey Kong game, that you have got these diagonal chutes, that you have got barrels coming down, that we think that we are very disturbed by that, and we are not going to continue a license with someone who looks like they are taking someone else's property even though we may have a claim against that person that they are taking our property."

He then sent me back a series of letters, I

think there were three letters. I remember them because they were three separate letters under the same date in which he made certain claims.

Getting through that, essentially what happened is that I responded and then we had a meeting and they came in and said "We will change the game" and they proceeded to do that.

They came back and Mr. Rissman went to the Far East, where whatever you do for the -- you know, the memory or the design is put in. He came back shortly thereafter, and this was all under some pressure because there was a Consumer Electronics show in Chicago, and they wanted to have the game ready and available for that time.

Q. Did you personally participate in the actual meeting with Rissman?

A. When they came bank from Hong Kong, yes. Mr. Rissman was there, his lawyer, Mr. Adler, Mr. Kaplan, Ms. Sifuentes, if I remember, and I was there. They brought in the material. We did not have a device at the studio to play it. We got into Mr. Adler's car. We went to a Sears Roebuck store in North Hollywood and Mr. Rissman hooked up his game to one of the models in the store and showed us the changes he had made.

Q. Were you satisfied with the changes?

A. Yes, I was.

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Q. Did you have discussions with Mr. Schwefel of Coleco with respect to the Tiger game and changes to be made in the?

A. Yes, I did.

Q. Could you tell us what you can recall of those discussions which you yourself had with Mr. Schwefel?

A. I told Mr. -- well, Mr. Schwefel was concerned about the Tiger arrangement.

Q. What was the nature of his concern?

A. His concern was that they were out with a product which was substantially similar to his product. I recollect because in the letters of May 18 there was a letter from Coleco that had been written to Tiger telling them that they were very concerned about the Tiger game.

Q. I will put in front of you, Mr. Hadl, the letters I believe you have referred to on May 18. You already have one of them -- that is 21 A. I am now going to put in front of you 21 B, and I believe the letter to which you refer is 21 B, is it not?

A. That is correct.

Q. And that was the letter from Mr. Kaplan to you?

A. Right.

Q. Is there an enclosure?

A. There is an enclosure to Tiger from David Goldberg, a partner at Kaye Scholer, and who represented

Coleco.

Q. To whom?

A. Tiger Electronics.

Q. Did you have any discussions with Mr. Schwefel in I which he advised you as to what Coleco's position was with respect to the game?

MR. KIRBY: Objection, your Honor.

THE COURT: Overruled.

A. Yes. I did. Mr. Schwefel was concerned about it. I then told him about the changes and indicated to him that -- I'm trying to recollect this exactly in sequence. I indicated to him that he would have an opportunity to look at the revisions.

Q. Did there come a time, to your knowledge, that Mr. Schwefel had that opportunity?

A. Yes, he did. He sent a lawyer to Chicago. This was after we looked at the game in the Sears Roebuck store with Ms. Sifuentes and Mr. Adler, and I felt that the changes Mr. Rissman -- he changed what he called the chutes, and he had changed them from the diagonal ones the way they are in Donkey Kong to kind of horizontal and vertical ones, and I believe he made other changes in the game. And I advised Mr. Schwefel that he could view the game, and he sent one of his counsel to Chicago to view it.

Q. And did he tell you, Mr. Schwefel, what Coleco's

position was as a consequence of that?

A. Yes. As a consequence he told me that he believed that he would take no action. He would not put it in writing, but he would take no action.

Q. When he told you that, do you recall was that a face to face meeting, incidentally?

A. No. I believe that was -- no. That was on the telephone.

Q. Did you subsequently have a face to face meeting with Mr. Schwefel on this subject, among others?

A. Yes. We both went to the Consumer Electronics show in Chicago and had a dinner meeting.

Q. What occurred at that dinner meeting?

A. Because in fact the Tiger game was being offered at the show, and in fact Coleco was at that point out with their new machine, and they were offering their thing, I remember visiting both exhibits, and Mr. Schwefel took me through the Coleco one.

We also had dinner that evening.

Q. What was said, as you remember, by Mr. Schwefel with respect to the Tiger game?

A. Well, what was most important to me was that he would take no action.

Q. Is that what he said?

A. That is correct.

Q. Did he give you an indication as to what the basis of that decision was?

MR. KIRBY: Objection.

Q. Did he say anything to you?

MR. KIRBY: Objection, your Honor.

THE COURT: Overruled.

A. Yes. He told me that he thought that they had made changes in the game, that there might still be a claim but from a business point of view he felt it wasn't worth pursuing and it would probably give them notoriety by making a fuss about it and he didn't regard it as a very important product in the market.

Q. Did you tell Mr. Schwefel that Universal would be willing to have Tiger make changes in the game, if necessary?

A. Well, I did that originally, and continued to. That was our position.

Q. Okay.

A. I might say that the result of all that was then that we entered into a subsequent agreement with Tiger which amended the original license agreement in which we gave them the right to continue to distribute, manufacture, and sell the game. And there were some changes. There was a variety of changes made in the arrangement.

Q. Now you are referring to the terms of the

settlement in the broader sense with Tiger?

A. That's right.

Q. All right.

Q. We are now approximately in mid May?

A. The reason I just said that is because we were in June at the Consumer Electronics show, and by the time we were in June though it wasn't committed to writing -- the agreement to Tiger didn't get finally committed to writing for several months, but there was an understanding at that point.

Q. Coming back to -- I want to go back in time and go back on another plane, if I may.

A. Right.

Q. What was happening with Nintendo?

A. As I recall, there were several conversations with Mr. Lincoln as to where they were, what was happening, and I believe in those conversations he said to me they were reviewing the matter, and there came a time when he indicated that he wanted to come -- he was going to come back down to Los Angeles with Mr. Arakawa.

Q. Did such a time come?

A. Yes. There was a luncheon meeting with just the four of us, Mr. Sheinberg, myself, Mr. Lincoln and Mr. Arakawa.

Q. What was the purpose of that meeting as you

understood it it?

A. As I understood the the purpose of this meeting was to come to some resolution of our claim against Nintendo.

Q. What occurred at the meeting?

A. To briefly describe it, the essence of the meeting was Nintendo came down and said to us, "Thank you very much, but there is no way we are going to work out an accommodation or agreement with you."

I must say we were -- Mr. Sheinberg and I were quite surprised by that strictly from the point of view we felt Mr. Lincoln could have called us on the telephone and said the same thing, and we regarded it as surprising that both of them came all the way to Universal, we had an extended lunch, talked about a variety of things, and at the conclusion of the lunch there was no basis for accommodation between us.

Q. You testified that you had several conversations with Mr. Lincoln. I assume these were telephone conversations?

A. That is correct.

Q. Go back to the meeting of May 6, Mr. Hadl. During the course of that meeting was there any discussion among the participants of that meeting of Universal's telex which at that point had already been sent to both Coleco

and Nintendo in Kyoto?

A. When you say -- I am a little unclear what you mean by discussion. Was there discussion of our rights?

Q. No. Let's do it the broadest way first. Discussion of the telex itself, which I am going to put in front of you again.

A. The essence of the discussion at the meeting was our position was we owned the rights --

MR. KIRBY: Objection.

THE COURT: Sustained.

A. I am sorry. I told Coleco and the representatives of Coleco and Nintendo --

MR. KIRBY: Objection. There is a question pending.

MR. FAIRHURST: I will withdraw the question and put another one.

MR. KIRBY: I ask it not be as leading as the others.

MR. FAIRHURST: I will be happy to try to accommodate you, especially since you are so successful in your objections.

Q. Mr. Hadl, what did you say about the rights that Universal claimed to own in the telex?

A. I told the representatives of Coleco and Nintendo that we owned the rights in King Kong.

Q. Was there a discussion as a consequence of your statement about the underlying nature of the those rights?

A. My recollection is that there was a discussion.

Q. What was the nature, what was the gist and substance of that discussion, as you recollect it?

A. I believed that -- no. Coleco's lawyer who was there, as well as either Mr. Lincoln or Mr. McGee, raised the question as to what was the basis of our rights. I referred them to Mr. Kroft.

Q. When you say you referred them to Mr. Kroft --

A. He was right there.

Q. Right. When you say you referred them to Mr. Kroft, you mean you said, "Mr. Kroft, answer that question." or "Mr. Kroft will answer those questions, gentlemen."

What precisely do you mean by that?

A. I said to them Mr. Kroft was our counsel in the matter, Mr. Kroft had extensively litigated this problem, Mr. Kroft had assured me we had the rights, and if there was any question they had about it they should discuss it with him. I say that because this meeting had several meetings. It broke up from time to time. There were people --

Q. Caucuses?

A. Caucuses. People walked out of the room. I

believe at one point Coleco walked out with Nintendo. At another point someone may have gone out individually. I can't reconstruct it completely, but there were caucuses during the meeting.

Q. Okay.

Now, in subsequent telephone conversations that you had with Mr. Lincoln to which you have given testimony, do you recall whether the subject of Universal's rights came up again in those conversations?

A. I don't recall that specifically.

Q. To your knowledge, Mr. Hadl, did Mr. Lincoln -- well, strike Lincoln. Did Coleco -- excuse me, did Nintendo's representatives contact Mr. Kroft, to your knowledge?

A. Not to my knowledge.

Q. Did Mr. Kroft ever report to you that he had been asked for a chain of title or to describe Universal's rights?

MR. KIRBY: Objection.

THE COURT: Overruled.

A. Not to my knowledge.

Q. Insofar as your dealings with Mr. Kroft are concerned, did you subsequent to receipt of the draft of the telex that Mr. Kroft prepared, that you reviewed, and that was subsequently sent out under Mr. Sheinberg's

signature to Nintendo and Coleco, have additional and further discussions with Mr. Kroft about the nature of Universal's rights, and so that we are perfectly clear within the time frame I am addressing my question to I am talking about from the time that telex was sent, April 28, up to June, when the complaint was filed, and to be more precise June 29, 1982?

A. Yes.

Q. That's the time frame I want to focus on.

A. Yes.

Q. What do you recall about those conversations that you can tell us? First, what did Mr. Kroft tell you?

A. As the situation was evolving, I became more involved with what was the basis and nature of the rights, because it seemed to be a continuing question that was being raised.

Mr. Kroft sent me at one point in May a rather high pile of documents which he said were from his view some of the more significant documents that related to the PKO-King Kong litigation. The early conversations we were having at the time focused more on -- focused, because it was something I had heard about and I asked them to explain more about -- was the claim that the copyright in the book which formed the basis of the first King Kong picture was in the public domain and that there had been a finding to

that effect, and what was the impact of that on our position.

In our discussions of that Mr. Kroft advised me, yes, there was such a finding, he said but the case had been settled, that on appeal the, I guess Ninth Circuit, had then vacated the judgment so there was some question in vacating the judgment the findings were vacated, so the question was what was the impact of that finding, and then, secondly, that even if an aspect or an element in this whole history of the book or an original underlying work was in the public domain it didn't mean that subsequent things, such as the motion pictures, were not still protected and protectible and from whence our rights derived, so that my concern about that particular side of the was allayed.

I didn't feel that there was a major problem there.

Q. Did you yourself, Mr. Hadl, review the documents that Mr. Kroft sent you that you have referred to?

A. He sent them to me for two purposes. One, that I should have them. But secondly at the time because we were also considering retaining you, and sending you the material necessary for the filing of a complaint.

Q. To your knowledge, did Mr. Kroft do anything to implement the decision by Universal to bring a lawsuit, and

I am using that in the broadest sense?

A. Yes. Mr. Kroft prepared a draft complaint.

Q. Did you review that draft complaint when you received it?

A. Yes, I did.

Q. Was a decision taken by Universal at some point to institute a lawsuit?

A. Yes. After the meeting with Mr. Arakawa and Mr. Lincoln, we decided to bring an action.

Q. Who made the decision, if I may put it this way, as to where that lawsuit was to be instituted?

A. I did.

Q. What was the basis upon which you made that decision?

A. The basis we made the decision had to do with the speed with which we believed we could get the case to trial.

We had had some experience that Mr. Kroft had at that point with the Betamax case in Los Angeles which I believe was then had been reviewed by the Ninth Circuit, but had taken four years or more to get where it was, and it was our judgment that we would get a speedier hearing here in New York, that this district was in fact much faster.

Q. To your knowledge, besides preparing the packet

of material to which you have referred, and this oral discussion you had with Mr. Kroft, did Mr. Kroft do any other acts of which you were aware to -- I am going to use the term prepare for the lawsuit?

A. I believe he was in contact with you.

Q. Aside from that.

MR. FAIRHURST: If your Honor will permit a leading question.

Q. Did there come a time when an assignment was secured from RKO?

A. Right.

THE COURT: Mr. Kirby's objection is sustained.

MR. FAIRHURST: Does that mean I can't talk about this, your Honor?

THE COURT: What happened next?

Q. Yes. What happened next?

A. Frankly, at the moment --

Q. I will see if I can refresh his recollection, your Honor. I am going to do it the legitimate way. We will take a little time here.

THE COURT: I don't believe it.

Q. I am going to put in front of you what has been marked and already accepted in evidence as Plaintiff's Exhibit 53.

Q. Does that refresh your recollection as to

whether an event occurred?

A. Yes.

Q. Tell us how it refreshes your recollection?

A. In discussing the filing of the complaint with Mr. Kroft, the question became whether or not RKO was a necessary party to the action.

Q. What do you recall Mr. Kroft told you?

A. Mr. Kroft said he thought there was a question about that.

Q. What was the nature of that question?

A. The question was because our rights came through Mr. Cooper that it had been decided that RKO was the trustee for the merchandising rights, and held them in trust for Mr. Cooper. We had paid Mr. Cooper I believe something like $200,000 for the rights, and there was a question as to whether or not, given the nature of this action, that RKO might have some interest in it, and, therefore, that they should be named as a party.

His suggestion was that rather than name them as a party and serve them, that we should consider whether or not we couldn't get an assignment from them to obviate the procedural problems involved.

Q. Did you yourself have any dealings with RKO to secure that assignment?

A. Yes.

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Q. With whom did you deal?

A. I dealt with a gentleman whose name I believe is Arnold Kaufman. I talked to him on the telephone.

Q. What was the nature of those discussions, if there was more than one?

A. I explained to him what the situation was and asked him whether or not they would be willing to give us an assignment.

Q. Can you infer from the fact we have the exhibit that they did?

A. That is correct.

Q. Did there come a time, Mr. Hadl, when you learned of what it was specifically that Mr. Kroft had said or done in the RKO 1975 litigation in the federal court action with respect to the issue of King Kong and the public domain?

A. As I indicated to you before in terms of the copyright in the book we were talking about that in the month of May.

Q. At that point you had not actually seen the transcript of proceedings in the RKO federal court action?

A. No. He sent me a fairly big pile of materials which I recollect going through, but not reading. That is to say line by line.

Q. Did there come a time you actually read or were

A. My recollection is it was staggered. I think the total consideration was $150,000.

Q. Incidental, does MCA, Inc. now employ Charles Paul, Skip Paul?

A. That's correct.

Q. Can you tell us when he was employed by MCA?

A. I believe within the last two weeks.

Q. Now, going back to Miss Sifuentes, you testified that you had a discussion with her in which you expressed upsetment over her having licensed Tiger?

A. Yes.

Q. So we are absolutely clear: You have read Miss Sifuentes' deposition testimony?

A. Her entire testimony?

Q. No. Strike that question.

Have you read Miss Sifuentes' deposition testimony in this case?

A. I have not read her entire deposition.

Q. You have read excerpts from it?

A. Yes, I have.

Q. You are aware that she testified at deposition to having told you of a conversation or discussion she had with Mr. DiMuro in which Mr. DiMuro came to a decision that Universal had no rights in King Kong; are you not?

A. Yes.

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Q. Did she ever advise you of that decision, alleged decision? Did you ever have a discussion of it with her?

A. She never advised me and I never had a discussion.

Q. Now, Miss Sifuentes is no longer employed at Universal; is that correct?

A. That's correct.

Q. What is your understanding as to the basis upon which her employment ended?

A. My understanding is she was fired.

Q. Was her discharge in any way, to your knowledge, related to Donkey Kong and King Kong?

A. Not to my knowledge.

Q. Do you have personal knowledge, Mr. Hadl, as to any matters on which she worked which may have contributed to her discharge?

A. Yes, I do. I was involved with a subsequent matter which happened about within 60 to 90 days subsequent to these event.

Q. When you say these events--

A The May-June period of 1982 involving King Kong and Donkey Kong, involving ET and an analogous situation, the home video rights for ET.

Q. Without going into all the details, can you tell

us in substance what the problem was?

A. The problem was essentially that the rights for an educational toy, a speak and spell model, that was done by Texas Instruments had been given to Texas Instruments in a way and drafted in such a manner that Texas Instruments was able to claim that the entertainment rights for home video depiction of ET were included within that grant and, therefore, Universal had -- I had to spend considerable time dealing with and ultimately settling out with Texas Instruments that problem so that Universal was in a position to license the home video/TV rights to Atari.

MR. FAIRHURST: I have nothing further.

CROSS-EXAMINATION

BY MR. KIRBY:

Q. Good morning, Mr. Hadl. My name is John Kirby. You will recall we met before when your deposition was taken?

A. Yes, I do.

Q. Do you recall when that was?

A. I recall it was in 1982.

Q. Mr. Hadl, you have testified that at some point in your employment at MCA that you were given an additional job of supervising Universal's litigation and its use of outside counsel; is that correct?

A. That's correct.

course of Mr. DiMuro working with you on drafting the Coleco agreement did you become aware that he was widely experienced in matters involving King Kong.

A. I would say the answer to that is no.

Q. Prior to asking Mr. DiMuro to participate in the Coleco draft with you, how many conversations had you had with Mr. Kroft in connection with what ultimately became this lawsuit? I am asking for a number; how many?

A. I can't recall.

Q. Well, let's see if we can do it together.

You had one conversation when you sent him out to play the game, Donkey Kong; is that correct?

A. That's correct.

Q. Can you place that in time?

A. Yes, I believe I testified it was in early April.

Q. In early April of 1982. And you testified that there was a second conversation when Mr. Kroft reported to you I've played the game?

A. That's correct.

Q. And you testified that in the course of that conversation, after hearing that statement and his statement that you have a claim, that you said prepare some kind of notification and draft a complaint; is that correct?

A. That's correct.

Q. That's the same conversation?

A2524

A. I don't recall that specifically.

Q. You testified on direct--

A But you are asking me how many conversations. I don't recall whether it was that conversation or possibly a next one. We can assume that or we can assume not.

Q. I don't want to assume anything, Mr. Hadl. As court closed yesterday you testified that Mr. Kroft called you back, said that he had played the game and that he thought you had a claim and that you responded draft a telex, draft a complaint; do you recall giving that testimony yesterday?

A. Oh, yes.

Q. Are you now telling us that that was more than one conversation?

A. No. But I didn't think that was your last question.

Q. All right. Now we have I guess agreed that you had two conversations that we have identified with Mr. Kroft?

A. Yes, we have.

Q. And I believe you testified that you didn't have any further discussion in that second conversation with Mr. Kroft about the nature of Universal's rights in King Kong; is that correct?

A. That's correct. What we discussed, as I have

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testified, was whether or not we felt the Donkey Kong was an infringement, not whether or not we had the rights. Our respective points of view of whether this was similar or substantially similar to King Kong.

Q. Let's talk about this second conversation. Did Mr. Kroft ask you any questions?

A. I don't recall. You will have to be more specific.

Q. Let me ask you this: Did Mr. Kroft ask you whether Universal was merchandising King Kong in that second conversation?

A. Not that I recall.

Q. Did Mr. Kroft ask you whether Universal was making any King Kong movies in that second conversation?

A. Not that I recall.

Q. Did Mr. Kroft ask you whether you had any, you, Universal/MCA, had any licenses outstanding for use of King Kong?

A. Not that I recall.

Q. As a matter of fact, you didn't even know whether Universal had any licenses outstanding for King Kong at the time of that second conversation, did you?

A. That's correct.

Q. And you didn't know whether Universal was, in fact, merchandising King Kong, did you?

A2526

A. At the time of the second conversation with Mr. Kroft, that's correct.

Q. As a matter of fact, you didn't know anything about Universal's use of King Kong when you had that second conversation with Mr. Kroft, did you?

A. No. I relied on Mr. Kroft.

Q. So it's fair to say that you didn't inform Mr. Kroft of anything because you didn't know anything about Universal's use of King Kong, did you?

A. No. I informed Mr. Kroft that we thought we had a claim and I wanted him to go play the game.

Q. Did Mr. Kroft tell you that he knew that Universal had -- in this second conversation -- outstanding licenses for the use of King Kong?

A. No.

Q. And I believe you testified yesterday that as far as you know no one from Universal, other than yourself, had discussed this possible litigation against the manufacturer of Donkey Kong, other than you, you were the only one that spoke to Mr. Kroft?

A. That's correct.

Q. During the course of that conversation, did Mr. Kroft say to you, Joe DiMuro is a man who knows a great deal about King Kong matters?

A. Not that I recall.

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Q. Did Joe DiMuro's name come up during that conversation?

A. Not that I recall.

Q. After that second conversation, when was the next conversation you had with Mr. Kroft?

A. The next one I can be certain about would be after Mr. Sheinberg had the lunch with Mr. Greenberg.

Q. All right. That's the conversation you have already testified about. That was the conversation when you called Mr. Kroft and said, in effect, as clients sometimes do, what the heck is going on, where is my telex and where is my complaint; is that that conversation?

A. To the best of my recollection.

Q. So that conversation we put as sometime after April 27th?

A. If that's the date of the lunch.

Q. That's the date of the lunch.

Do you know what date the telex was sent?

A. I saw it just a little while ago. It was April -- I believe it was April 28th.

Q. And the lunch was April 27th. Does that mean that this third telephone conversation with Mr. Kroft was on April 27th or sometime on April 28th?

A. Frankly, Mr. Kirby, I don't recall and I don't recall whether or not there might have been a conversation

Is it your testimony now that if you saw a draft prior to the luncheon that Mr. Sheinberg had with Mr. Greenberg that you saw it on the day before that luncheon?

A. I couldn't tell you a specific date.

Q. I thought I heard you say April 26th?

A. I said it could have been.

Q. Let me ask you this, Mr. Hadl: We now have three conversations that you recall and maybe another one that you don't recall. In any of those conversations did Mr. Kroft ask you any questions about what Universal was doing with respect to King Kong, any of those three conversations?

A. Not that I recall.

Q. And at the time the telex was sent to Nintendo on April 28th, you personally still didn't know anything about what Universal was doing with respect to King Kong, did you?

A. King Kong merchandising?

Q. King Kong merchandising.

A. I answer yes.

Q. Did you know anything about what Universal was doing with respect to King Kong movies on April 27th or April 28th?

A. No.

Q. So the question did you know anything about what

Greenberg said at that lunch is Mr. Sheinberg, right?

A. That's correct.

Q. Let me ask you this: As part of your kind of director of litigation responsibilities, did you ever have occasion to read what Mr. Greenberg said about that lunch?

A. I think Mr. Greenberg has given a deposition in either this or a related case and I have not read it.

Q. Did anyone tell you what he said about that lunch?

A. I think -- I know that the only thing I have heard as to the now famous statement "what took you so long?" He characterized it as what took you so long to find out that we were going to do Donkey Kong, not what I understood it to mean. He recharacterized it.

Q. He recharacterized, as far as you were concerned, because you were listening to Mr. Sheinberg's characterization, right, and that's your only source of knowledge about that lunch?

A. That's absolutely correct.

Q. As a matter of fact, by April 28th, Mr. Hadl, you had investigated, hadn't you, how long Donkey Kong had been on the market? The answer to that is just yes or no. Had you investigated how long Donkey Kong had been on the market by April 28th?

A. At some point I knew it had been on the market

since the previous year and I think it was the previous summer. I can't recollect whether I had that information by April 28th.

Q. Let me make it more precise because maybe this will help refresh your recollection.

At the time that telex was sent out from Universal, did you know how long Donkey Kong had been on the market?

A. I think I just answered that. I said that I knew at some point that it had gone out the prior year and I believe it was the prior summer that it had been put into the arcades. But I didn't recollect at what point I became exactly aware of that time frame.

Q. At the time you sent the telex, had you conducted any investigation to learn how many Donkey Kong machines had been sold?

A. At the time I sent the telex?

Q. Yes.

A. My best recollection is no.

Q. Had you caused a trademark search to be made to determine whether or not Nintendo had on file a trademark application for Donkey Kong? Are you shaking your head?

A. I am thinking. Not to the best of my recollection, no.

Q. Had you asked Mr. Kroft to have that done?

A. No.

Q. At the time the telex was sent, did Mr. Kroft report to you that he had in fact had a trademark search done, at the time the telex was sent, Mr. Hadl?

A. I don't recollect, I don't remember.

Q. At the time the telex was sent, Mr. Hadl, did you have in your hands or had you caused to be made a trademark search for King Kong, at the time the telex was sent?

A. My answer is no. The reason I say no is I believe the first -- I believe -- my recollection is that the first time the question of a search came up was at the meeting of May 6 with either Mr. Schwefel's counsel or Mr. McGee. I have some recollection of a discussion of a search at that meeting.

Q. So somebody from -- if I can characterize it this way and I realize this is inaccurate -- the other side?

A. Yes.

Q. Of Universal, Nintendo or Coleco said something about having done a search themselves?

A. That's correct.

Q. Let me ask you this: When that meeting broke up, did you ask to have a trademark search done for Universal?

A. No, not to the best of my recollection.

Q. Now, between the time the telex was sent, Mr.

Hadl, and this meeting of May 6, did you have any telephone conversations with Mr. Kroft?

A. I can't recollect specifically but I assume I did because he came to the meeting of May 6 and I assume I talked to him before the meeting.

Q. But you don't recollect any conversation today?

A. Not a specific conversation.

Q. Do you recollect a general conversation or are you just inferring that you must have told him about the time of the meeting?

A. Yes, I am inferring that.

Q. So you have no recollection, general or specific, about any conversation with Mr. Kroft between April 29 and May 6?

A. I have a recollection that he came to my office some period of time before the other people arrived for the purpose of --

Q. What other people?

A. The people from Coleco and Nintendo.

Q. How long was he there before anyone from Coleco arrived?

A. My recollection is it was a short period of time not something like he was there all day before they came.

Q. When did they come?

A. I don't recollect.

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Q. Before lunch?

A. I'm sure somebody else knows that. I can't tell you that right now.

Q. Did you have a discussion with Mr. Kroft about the upcoming meeting when he came to your office sometime before these people arrived?

A. That would have been the purpose for him coming early.

Q. I didn't ask you whether that would have been the purpose. I asked you did you, in fact, have a discussion with him about the upcoming meeting.

A. Yes, I would have.

Q. Did you or didn't you?

A. To the best of my recollection, he came early and we had a discussion.

Q. And you don't remember how long it was?

A. No, that I don't are recollect.

Q. Do you remember what was said during the course of that discussion?

A. Yes. We would have discussed --

Q. No. The question is do you remember, yes or no?

A. Yes. I would have said to him I conduct the meeting, that I would lead the discussion and I would like him to participate to the extent questions arose to which he could respond.

Q. Did you tell Mr. Kroft, based on your discussions with Mr. Schwefel, that you expected certain questions to arise during the course of that meeting?

A. Not that I recollect.

Q. Let me ask you specifically, Mr. Hadl: Did you tell Mr. Kroft that you expect the question of what rights Universal had in King Kong to come up at the meeting?

A. I don't recollect that specific exchange.

Q. Do you recollect Mr. Kroft saying that he would be ready to deal with that matter if it came up?

A. I don't recollect that, but I would assume that that's what we said.

Q. I am not interested in your assumptions.

A. Okay.

Q. Do you recollect whether he said that?

A. No, I can't recollect that. I can't recollect the conversation at this moment.

Q. During this little preliminary meeting with Mr. Kroft, did you discuss Mr. DiMuro?

A. The answer is no. As I have said before, I am having trouble recollecting. I can only give you at this moment what my best view is as to what Mr. Kroft and I would have discussed at that meeting. I can say with some greater certainty that we would not -- that I do not remember discussing Mr. DiMuro.

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A. No, not to my -- no. I don't recall any extensive conversation at the meeting about the rights.

Q. Is it fair to say, Mr. Hadl, based on your testimony, that when you went into that meeting on May 6 you didn't personally know anything about Universal's rights in King Kong, you?

A. You mean personally from firsthand knowledge having gone through the RKO proceeding?

Q. Personally from any source.

A. Personally, I knew what Mr. Kroft had told me.

Q. Is it your testimony that Mr. Kroft told you, you, Universal, owned the rights in King Kong?

A. He told me -- yes.

Q. Did he tell you that?

A. Wait. Let's be careful. What Mr. Kroft advised me going back was that I was on firm ground to bring this complaint and this action.

Q. Well, that wasn't my question, was it? In the meeting you stated to Coleco and Nintendo Universal owns the rights in King Kong.

Now, my question to you was: Did you personally know anything about Universal's rights in King Kong at the time that statement was made at the meeting?

A. Well, I believe I have testified this morning that between the time the telex was sent, starting in that

Q. That's right. You got it.

A. I think Mr. Kroft and I would have had several conversations. We had a question about where we were going to file the complaint. We had a question about who was going to represent us in New York. I would have advised Mr. Kroft about the Tiger matter. So I would have discussed those three things with Mr. Kroft. And I think I also indicated there was a point in May when Mr. Kroft sent me a stack of materials.

Q. Which you didn't read?

A. Well, that's your --

Q. You testified, Mr. Hadl, this morning and in your deposition that you didn't read them, you leafed through them and sent them on to Mr. Fairhurst?

A. That's correct.

Q. You didn't read them?

A. I didn't read them line for line, that's right.

Q. So your discussions with Mr. Kroft were where do we file the complaint, who represents us?

A. Right.

Q. You advised him about Tiger?

A. Right.

Q. And at some point you talked with him about the public domain status of the book?

A. That's correct.

Q. Anything else between May 6 and the time the complaint was filed?

A. Not that I recollect.

Q. Do you get involved in the movie business at there at your studio lot?

MR. FAIRHURST: What is this Wyoming, your Honor?

Q. Do you understand the question?

A. No, I don't.

Q. Do you have anything to do with Universal's movie studio operation?

A. I still don't understand the question. What do you mean by the studio operation?

Q. When Universal is considering producing a movie, do you get involved in that?

A. You mean as to which property we're going to choose to make a movie?

Q. Yes, that kind of thing.

A. Slim to none, rarely.

Q. Do you get involved in legal matters relating to the production of movies?

A. The dividing line is between something which is inside versus outside, litigation versus nonlitigation legal problems. Those kind of problems would be handled by the law department and by the house counsel.

Q. I think I know the answer to this question, Mr.

Hadl, but maybe you can help me.

Based on your testimony to date, is it true that you did not know that three weeks prior to your sending the telex to Nintendo and about four weeks before your meeting that Mr. DiMuro had written to Mr. Sheinberg and stated "RKO owns the visual representation of the King Kong ape" and had gone on to include guidelines among which were the Universal ape must be designed as an independent original creation without reference to stills or other reproduction of RKO's ape or DiLaurentiis' ape, you didn't know that when that telex was sent, did you?

A. No, I did not.

Q. You didn't know he had sent the memorandum?

A. No.

Q. And you didn't know that the position in that memorandum related to Mr. Sheinberg was that RKO owns the visual representation of the King Kong ape, you didn't know that either, did you?

A. No.

Q. And you didn't have any knowledge, when you sent that telex, of who owned the visual representation of the ape, did you?

A. No.

Q. Now, I know it's difficult for you to recall some of these conversations, Mr. Hadl, but between May 6

A. Well, it's speculation, but I think it's --

Q. I am not interested in that.

A. Okay.

Q. If you know that Miss Sifuentes and Mr. Adler entered into the Tiger license without consulting anyone at the law department, then you can tell us?

A. I can't tell you that.

Q. But Miss Sifuentes did serve as Mr. Adler's lawyer in many of the merchandising matters; you do know that?

A. That's right and --

MR. FAIRHURST: Your Honor, we are getting cutting off here and I understand Mr. Kirby's enthusiasm and I respect it. Please, let the witness answer and let me hear it. We have colloquy here constantly and it's been going on for five minutes. I can't hear what the witness is saying when Mr. Kirby does it.

THE COURT: Have you finished your answer, Mr. Hadl?

THE WITNESS: Yes, I have.

Q. By the way,, Mr. Hadl, do you know what Mr. Adler is doing now?

A. I don't know personally. I have only heard from my counsel.

Q. Well, tell me what you have heard.

MR. FAIRHURST: As long as Mr. Kirby doesn't regard this as an immense waiver of attorney-client privilege, I will not invoke it. If he wants to use this to open a door to some further thing I will invoke it.

MR. KIRBY: I think I am not intending to get anything other than the information in response to this question on the record.

A. That Mr. Adler is engaged in a similar pursuit of being involved in the merchandising business.

Q. He has his own company?

A. Yes.

Q. And Miss Sifuentes is one of his colleagues in that company, isn't she?

A. I believe she has rejoined him I don't believe that --

Q. So the Sifuentes/Adler team has reformed outside the aegis of Universal/ MCA; is that your understanding?

A. Yes.

Q. Let me ask you this, Mr. Hadl: As far as you can remember, based on your testimony -- tell me if I am wrong on this -- you didn't have any knowledge about Mr. DiMuro's extensive involvement and knowledge of the King Kong property as of the time you called him to draft a licensing agreement -- strike that. I don't want to get into any quarrels -- to draft an agreement with Coleco that

Q. And after you received Plaintiff's Exhibit 54, which is a memorandum from Miss Sifuentes to you talking about King Kong merchandising, when the author of every memorandum that she attaches is Joseph V. DiMuro, you knew then that Mr. DiMuro was a pretty central figure in King Kong at Universal, didn't you?

A. You are assuming something again. I believe when Mr. Fairhurst showed me this morning I said to him I looked at this before the trial but I didn't have a direct recollection of it, that I believed Miss Sifuentes sent this to me not in response to something I requested and I wasn't sure the extent to which I had analyzed it carefully when I received it.

At that point in time I was -- as indicated -- I had had a conversation with her in which I had expressed some disturbance at how the Tiger -- about the Tiger matter.

So I think that's the answer.

Q. As a matter of fact, at the time she sent this this memorandum, you were angry as hell with her, weren't you, because she had licensed the King Kong property to Tiger?

A. That's what I have testified.

Q. And you yelled at her, didn't you?

A. Well, I don't recall yelling at people. But we could have had an angry exchange along the lines of, you

know, how come you let this valuable property go for $15,000.

Q. Was that the total consideration that Tiger paid?

A. That number sticks in my head. You can refresh my recollection that it's more or less. That's the number that sticks in my head.

Q. Did they pay a royalty?

A. Are you saying at that time had they paid a royalty?

Q. Did the agreement call for a royalty payment?

A. I believe the agreement called for some royalty payment. I think the $15,000 was either an advance or guarantee.

Q. You didn't want to leave the court with the impression that Miss Sifuentes had given away the King Kong property for you said 15,000 to Tiger, did you?

A. I think I have just testified as to what I think the deal was.

Q. And during this period from May, after your telex was sent in April and May 12 you were, to use your counsel's words, dealing on a lot of planes, weren't you? You were expressing your anger to Miss Sifuentes about the King Kong property licensed to Tiger; you were whipping into shape the Coleco agreement which you had entered into in principle on May 5 or before; you were dealing with Nintendo about the King Kong property; you may have been

having conversations with Mr. Kroft, you are not really sure whether you had any during that period but you know he was there at that meeting and you get a packet of materials relating to "subject King Kong" from the object of your ire, Miss Sifuentes, with Mr. DiMuro's name all over every memorandum, and it's your testimony here today you didn't read it?

A. Mr. Kirby, with due respect, you have just said a lot and you are asking me to say yes to everything?

MR. KIRBY: Your Honor, may we have the question read back in the witness needs it?

THE COURT: Sure.

MR. KIRBY: Would you listen carefully as it's read back, Mr. Hadl.

THE WITNESS: Sure.

(Record read)

A My testimony is that I don't recall whether I read it on May 12th. At some point I saw this material.

Q. Well, let me ask you this: Maybe this will help refresh your recollection as to this question. You have testified you asked Mr. DiMuro's assistance on redrafting or drafting an amendment to the Tiger agreement, right?

A. Pardon me. Could you repeat that?

Q. You testified that you asked Mr. DiMuro's assistance at some point in drafting an amendment to the

drafted sometime subsequent to June of 1982?

A. That's correct.

Q. But the agreement with Tiger was entered into sometime in June in 1982?

A. I don't think that agreement was signed until the fall, like September or October and I think that until it was signed there was, in fact, not a total meeting of the minds. I can't recall exactly but I think there were one or two provisions that were in dispute.

Q. At any time--

A I think the critical point was that the Tiger game was out at the consumer electronics show in June and that it was on the market and it was being marketed.

Q. At any time prior to June 29, 1982, did you have any discussion with Joseph DiMuro with respect to Universal's rights in King Kong?

A. I don't remember.

Q. Did you, other than Plaintiff's 54 presently before you, which consists of Miss Sifuentes' cover note "subject King Kong" and the series of memoranda, letters, et cetera in which Mr. DiMuro was involved, did you receive anything in writing from Mr. DiMuro on the subject of Universal's rights in King Kong?

A. Not that I recall.

Q. Did you direct a question to anyone within

Universal as to whether there was anyone on the in-house staff who had that expertise in King Kong?

A. Not that I recall and the reason for that is that the matter was a matter of litigation. We do not handle any litigation in-house at MCA. All our litigation is handled by outside counsel and it would be our normal practice and procedure to be -- to have outside counsel retained if we were filing a complaint in a court.

Q. The complaint was filed on June 29th, right?

A. That's correct.

Q. Before that time the matter wasn't in litigation, was it?

A. No. On April 28th we had sent a telex making perfectly plain we were going to start litigation.

Q. Indeed, you had made a decision to start litigation well before April 28th, hadn't you?

A. That's correct, when I talked to Mr. Kroft I said prepare a complaint.

Q. Right, after he told you about playing the game and you had a complaint, you told him prepare a complaint.

Who made the decision to assign Mr. DiMuro responsibility for handling the Nintendo litigation from the in-house aspects?

A. You're saying after the complaint was filed.

Q. I don't know when. I said who made the decision.

you formulated that opinion?

A. No, I had not.

Q. Okay. Had you seen the 1933 movie King Kong?

A. No, I had not.

Q. Had you seen the 1976 movie King Kong?

A. Yes, I had.

Q. Had you seen any product licensed by Universal--

A By the way, my children had also seen the movie.

Q. Thank you.

Had you seen any product manufactured under license by Univcrsal for King Kong?

A. No.

Q. And so when you say substantially similar, the only King Kong thing that you had seen was the 1976 movie and that's what you were referring to, wasn't it?

A. That's correct.

Q. Did you tell Mr. Sheinberg that that's what you meant, looks like the 1976 movie to me Sid, did you tell him that; did you say that in words or substance to Mr. Sheinberg?

A. Mr. Kirby, I think what I told him and what I have testified to was that I thought we had a claim and as a result of the conversation with Mr. Sheinberg I called Mr. Kroft, asked him to go and play the game and then he came back to me. He played the game and he confirmed my

Q Did Mr. Sheinberg suggest, when you made that call to him and told him you thought we had a claim, that you consult with Joe DiMuro?

A No, he didn't. The answer is "no."

Q He didn't?

A No.

Q Did you know at that time that Mr. Sheinberg apparently made a practice of referring just about every call relating to King Kong to Mr. DiMuro?

Did you know that?

A No, I did not.

Q And you already testified that you didn't know that probably within a day or two Mr. Sheinberg had on his desk a memorandum addressed to him from Joe DiMuro, Subject King Kong, with a lot of guidelines about using King Kong, April 8, 1982, just about the time you got that buckslip and played the game; right?

A No, but what I did know was Mr. Kroft was the outside counsel who handled the King Kong Matter, that this was a matter that was potentially going to go to litigation, and it was no, therefore, something that would be handled in house, it would be something to be handled by outside counsel, and Mr. Kroft, having spent years in the King Kong matter, was the man to handle it.

Q It is certainly not your testimony, is it, that every claim that Universal wakes up feeling like asserting against someone that you immediately pick up the phone and call outside counsel, is it?

MR. FAIRCHILD: I object to form.

THE COURT: Sustained as to form.

Q Mr. Hadl, do you remember that memorandum that your boss sent to everybody at Universal setting out what your new duties and responsibilities were? Do you remember that memorandu, yes or no?

A Yes. You asked me about it before.

Q Do you remember your testimony about that was if a legal matter arose try to have it handled by in house legal department, and failing that refer it to outside counsel? Do you remember that memorandum?

A I remember that.

I don't see, you know, that necessarily would apply here. This was a matter in which we were affirmatively going to need outside counsel to file an action against somebody else.

A Is it your testimony, Mr. Hadl, that whenever Universal believes that there is a product infringing on one of its rights that the matter is immediately turned over to outside counsel without any consultation in house? Is that your testimony?

A Could I hear the question again?

THE COURT: Certainly.

(Question read.)

A When you say immediately here, I think that is the problem I was having. The difference here is,right, Mr. Sheinberg sent me something, said, "I think this is a problem," I went out, played the game, and was convinced in my own mind that in fact there was not only a valid but I felt astrong claim here, and given the responsibilities I had there was nobody furhter to consult with at this point. This matter needed to be handled by outside counsel.

We've had that arise on one or two other occasions, and I have done the same thing.

Q Okay.

Now, Mr. Sheinberg did not tell you to consult Joe DiMuro?

A That's correct.

Q nd after that conversation when you reported back, followed up by placing your call to Mr. Kroft, when was the next conversation you had with Mr. Sheinberg about the subject Donkey Kong or King Kong?

A I would -- well, here we go again. I can't give you --. I know we had a conversation after we had lunch with Mr. Greenberg. Did we have a conversation

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send the telex.

Q Okay, okay. And Mr. Sheinberg told you about that?

A That's correct.

Q Okay. And then the telex was sent?

A That's correct.

Q And as I understand it from what your testimony is, Mr. Hadl -- and you correct me -- that on April 28th when that telex was sent Universal had done the following things:

One: Mr. Sheinberg had read or heard something about Donkey Kong, and contacted you.

Two: You and your children had played the game, Donkey Kong.

Three: You had told Mr. Kroft to play the game. Mr. Kroft played the game and said, "I think we've got a claim," and you said, "Draft a complaint and a notification."

Then Mr. Sheinberg, to precipitate the telex, reported to you his view of what Mr. Greenberg of Coleco meant when he said in words or substance, "What took you so long? Why are you raising the subject now?" And then the telex was sent. Is that correct?

A You have characterized "What took you so long" differently, but --

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Q Forget how it is characterized. That conversation was reported to you?

A Yes.

Q And then the telex was sent?

A Yes.

Q Nothing else?

A From my knowledge, nothing else.

THE COURT: Can I suggest we resume after lunch.

MR. FAIRCHILD: A good suggestion.

MR. KIRBY: Thank you. Judge.

THE COURT: Two o'clock.

(Adjourned to 2:00 p.m.)

A. No.

Q. That subject just didn't come up?

A. That's correct.

Q. Now, is it fair to say, Mr. Hadl, based on your testimony to date, that as of the time the telex was sent on April 28th no one had raised, in the sense of bringing to your attention, that there might be any question about the scope of Universal's rights in King Kong?

A. To the best of my recollection, no.

Q. I take it that if we go from April 28th to May 6th, when you sat down with the representatives of Coleco and Nintendo, that no one had raised the question of Universal's rights in King Kong to you?

A. I think we talked this morning about a meeting which I had with Mr. Kroft prior to the arrival of the Coleco and the Nintendo people and I think I said to you that there was some point at which Mr. Kroft and I had a conversation about this issue of the copyright on the book being in the public domain and I believe I also testified that I couldn't exactly pinpoint whether that conversation may have occurred when Mr. Kroft was in my office before they arrived or whether it occurred at some other point in that period.

I think as you yourself have indicated, there were a lot of different things going on at the time and

it's hard for me to pinpoint exactly when that occurred.

Q. Well, when that occurred, Mr. Hadl, was the subject the public domain status of the book King Kong?

A. Yes.

Q. Nothing else?

A. When you say nothing else --

Q. Nothing else that related--

A -- that related to our rights in King Kong?

Q. Right.

A. Yes, to the best of my recollection, no, nothing else.

Q. Who raised the issue, who brought it into the conversation?

A. I don't remember.

Q. Well--

A I can give you an assumption but you don't want that.

Q. I don't want your assumption.

A. Thank you.

Q. Let's work towards getting to something you recollect. At the time the subject came up, had you read the Cooper judgment?

A. I think I have testified before that the first materials I received were a fairly big package which Mr. Kroft sent me and to the best of my recollection that was

around the middle of May. No, I had not on May 6th, read the Cooper judgment.

Q. I'm sorry. If I have confused you, Mr. Hadl, I apologize.

I am asking you about the conversation you had with Mr. Kroft about the public domain status of the book King Kong.

Now, I believe your testimony to be that you can't tell me when that conversation took place other than that it took place sometime prior to the filing of the complaint in this action; is that correct?

A. I'm trying to think whether I can fix it at any earlier point than that.

This action was filed at the end of June.

Q. June 29th?

A. I think it took place sometime in the month of May. My difficulty is pinpointing whether it occurred before that meeting with Coleco and Nintendo people or subsequently. I know that I -- my best recollection is that I received that package of materials subsequent to the meeting.

Q. And it is your best recollection that that conversation took place prior to the time you received the stack of materials; is that correct?

A. Yes.

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Q. So you're confident in saying that you hadn't read the Cooper judgment?

A. At the time of the meeting, correct.

Q. At the time of the conversation with Mr. Kroft about the public domain status?

A. That's correct.

Q. And you hadn't read the Universal judgment?

A. That's correct.

Q. And you hadn't read the findings of fact and conclusions of law that accompanied both?

A. Yes.

Q. You have already testified that you didn't know about the transcript that contained Mr. Kroft's statement to the federal court there; that's correct too?

A. I knew there was a case. I hadn't read the transcript.

Q. And you didn't know what Mr. Kroft said?

A. No, I did not know what Mr. Kroft said.

Q. So, with that in mind, do you believe that Mr. Kroft brought up the subject of the public domain status of the book King Kong or you did in that conversation with him?

A. To the best of my recollection, he did.

Q. Did Mr. Kroft tell you that Judge Real had found that the book was in the public domain?

A. I think we went over this or I testified to this

before. I guess we can review it.

I think there were two issues. Issue one was that there had been a finding but that the case had been settled and the judgment had been vacated, including the findings.

Point two was that even though the underlying original King Kong book, whether it was or was not in the public domain -- I further recollect that there was a question about whether that finding was really correct, assuming it still was a finding because it had been vacated.

The next point was that even if it were that didn't necessarily mean that the picture, the '34 picture or the other picture, were in the public domain. Based on what Mr. Kroft told me, he still felt that we had a valid claim.

Q. Okay. Now, you say that Mr. Kroft said that that indeed was in the judgment of the court when it was issued, that there was a question as to whether or not that finding was correct, that there was a further question as to whether or not it was still in effect and, finally, there was the issue of whether or not that finding, if it were still in effect, had anything to do with Universal's rights; is that correct?

A. That's correct.

Q. That's the substance of what you and Mr. Kroft

discussed?

A. To the best of my recollection.

Q. In having that conversation, did Mr. Kroft tell you that in that litigation it was Universal's position, argument and evidence that the book was in the public domain and that that when Judge Real made that determination he was doing so because that's what Universal asked him to do; did he tell you that?

A. I don't know that he told me exactly the way you characterized it. I think he did say to me we argued that the book was in the public domain.

Q. Okay. But he went on to say even though we made that argument, that finding, that determination may have been incorrect?

A. That's correct and I believe he also said he didn't think it precluded us from taking the position we were taking in this matter.

Q. Okay. I'm trying to take them one at a time. Mr. Kroft said that what we asked Judge Real to do and what Judge Real did may have been incorrect?

A. That's correct.

Q. Okay. And did Mr. Kroft tell you in that conversation that the original judgment in which that determination was made had been vacated?

A. I think I just said that.

Q. He told you it had been vacated?

A. Yes, -- be careful here. I think there was a settlement and I don't exactly know whether it was vacated, whether it was vacated as a result of an order of the Ninth Circuit or Judge Real did it. I don't know the exact technicalities, but the judgment was vacated.

Q. That's what Mr. Kroft told you, because you didn't know anything about the litigation other than what Mr. Kroft told you?

A. That's correct.

Q. Did Mr. Kroft also tell you that the judgment in which that was contained, the Cooper judgment, had been reinstated in January of 1981, approximately, 15 or 16 months prior to your conversation with him?

A. I don't recall that.

Q. Do you know whether or not Mr. Kroft even knew that the judgment had been reinstated?

A. I can't answer that.

Q. Did Mr. Kroft tell you, in words or substance, that there isn't any issue as to whether or not the book is in the public domain because in the reinstated judgment at paragraph 10, in January of 1981, Judge Real said that this judgment shall not affect the finding that the serialization and novel King Kong are not public domain; did Mr. Kroft tell you that?

A. Not that I recall.

Q. Okay.

A. I have told you what Mr. Kroft told me and that's the basis for which I form my belief.

Q. I understand.

Did there come a time prior to the questions that I am now putting to you, Mr. Hadl, that you found out, by review of the documents or otherwise, that the Cooper judgment was reinstated?

A. Well, I'm having some trouble in responding to that because to the best of my knowledge sitting right here today I still have the opinion that I gave to you just before as to the validity of the finding that the book was in the public domain.

Q. Okay. As I understand your response, sitting here today you don't know whether or not the judgment was reinstated?

A. The judgment embodying that finding?

Q Yes. You don't know and I take it from your answer that Mr. Kroft never brought that to your attention, assuming it's a fact, he never brought that to your attention?

A. Well, he might have brought that to my attention but it would have been as part of the discussion we had -- and again I don't know all of the legal -- all of the

technicalities of the reinstatement, if that's correct, of that judgment. But his position with me was still the position which you and I have gone over.

I think it might be useful to add, because I just happened to note this yesterday in the newspaper, that Disney is suing somebody over Pinnochio and the person is claiming that Pinnochio is in the public domain. It's not that the book Pinnochio is in the public domain. It's not in our business the beginning and end of something if an underlying work or aspect of a property is in the public domain.

Q. Thank you for that interesting observation.

Now, Mr. Hadl, did Universal claim rights arising from the Cooper judgment?

MR. FAIRHURST: I have to object to the form, your Honor, because I am not certain what the context is, brought a claim against what, this case or some other case?

MR. KIRBY: I am talking about rights in King Kong arising from the Cooper judgment.

THE COURT: Overruled.

A. Well, it would help me, Mr. Kirby, if you told me what period of time you are talking about. You are asking did we do something.

Q. What about in June of 1982, did Universal claim that it had rights in King Kong arising from the Cooper

judgment?

A. I think the only answer I can give to you on that is that when it came time to file the action we retained Mr. Fairhurst. Mr. Kroft had been working on the matter up to that time. We then retained Mr. Fairhurst. He was sent all the documents and I believe he also had a copy of Mr. Kroft's draft complaint and he reviewed that --

MR. FAIRHURST: Be careful at this point. I don't want to begin waiving an attorney-client privilege when I don't have a chance to pop in here, your Honor.

A. I was going to terminate and say he filed the complaint on our behalf.

Q. Mr. Hadl, I believe you testified this morning that you had already decided to file suit by May 21st; is that correct?

A. Well, if that's the day we had the luncheon with Mr. Arakawa and Mr. Lincoln and they left telling us they would not reach an agreement with us, the answer is yes.

Q. Let's just take that as a nice convenient date, the date you, Universal, decided to file suit. On that date --

MR. FAIRHURST: I'm sorry. I have lost this now, your Honor. Objection to the form. I don't know what date he's talking about.

MR. KIRBY: May 21st, 1982.

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Q. You know what date I'm talking about, don't you?

A. I do. I don't know what the question is.

Q. I have not asked it yet. Your counsel has intervened.

It's May 21, 1982.

MR. FAIRHURST: May 21, 1982. If we are going to work off of a date for the second luncheon, why don't we get the right date?

MR. KIRBY: Okay.

Q. I believe that the testimony on the record, as represented on this chart, is that on May 21st Mr. Sheinberg and you, Mr. Hadl, met with Mr. Lincoln and Mr. Arakawa in the fancy private dining room at Universal City Studios lot and Mr. Sheinberg told Nintendo that Universal litigation department turned a profit and start saving money or attorneys' fees. That's the date I'm talking about.

MR. FAIRHURST: I move to strike that question because it is not a question. It's a long statement by Mr. Kirby.

THE COURT: It's true. The question has not yet been posed.

Q. On May 21st you have testified that you made the determination, Universal made the determination to file suit against Nintendo.

Now, my question to you is: On May 21st, 1982, did Universal claim rights in King Kong arising from the Cooper judgment?

A. You're asking me a question I can't answer.

Q. Because you don't know?

A. Because on May 21st, that's right, I don't know.

Q. On May 21, 1982, did you know of any other judgment or agreement or document on the basis of which Universal is claiming rights in King Kong?

A. Yes, I did.

Q. And what was that?

A. In the telex of April 28 it said that our rights were based on an assignment from Mr. Cooper. If you show me the telex I could find it now. I believe that was in there.

Q. Had you read the agreement between Universal and Major Cooper when the telex was sent?

A. No, I had not.

Q. Had you read it on May 21st?

A. No, I had not.

Q. Now, Mr. Hadl, we have you and Mr. Sheinberg discussing what to do about Coleco after the luncheon meeting.

When was the next conversation you had with Mr. Sheinberg on the subject of King Kong/Donkey Kong?

A. You mean other than Universal?

Q. Other than Universal.

A. No.

Q. Did you know that RKO claimed rights in King Kong, on May 6? I know subsequently you have learned a great deal, Mr. Hadl. I am asking about May 6.

A. Sometimes it's difficult to separate that all out.

Q. I am sure.

A. When you said rights I thought you were talking about in this last question you asked me what we have been talking about here, what we call merchandising rights.

Q. No. I'm talking about rights in King Kong?

A. You meant rights across the board?

Q. Right. On May 6 I asked you do you know what entities claimed rights in King Kong.

A. It's hard for me to exactly reflect on what I knew. I would think the answer to that was yes. I knew there was a motion picture that RKO had made and I knew there was a 1976 picture -- the 1976 picture I had seen. I hadn't seen the '34 one. Yes. I knew they had rights in those pictures.

Q. You knew RKO and the makers of the '76 picture claimed rights in King Kong?

A. I would have been aware -- I didn't know, for

example, whether the '34 copyright was still valid. I would have assumed it was and that the copyright on the picture, the '76 picture was still good.

Q. Did you know about what rights Major Cooper claimed on May 6, 1982?

A. I think the answer to that is no. I shouldn't say I think. The answer to that is no.

Q. Prior to the meeting on May 6, had you discussed that question with Mr. Kroft?

A. Which question?

Q. What rights others claimed in King Kong, prior to May 6.

A. No. I was operating again on the advice of Mr. Kroft that we had the rights to bring this action.

Q. And Mr. Kroft didn't raise the subject of RKO or DDL or Paramount or Major Cooper with you?

A. I think what we have discussed is that we had a conversation about the public domain aspects of the book and you have now asked me about the pictures and I -- what I have answered is yes I believe I understood, had to understand, that there were two pictures and that those pictures were protectable.

Q. Is it your testimony now that on May 6 you knew that?

A. I would qualify it this way: I wouldn't have

been certain who owned the rights that flowed from that. But I was aware that there were two pictures, that we had rights, Mr. Kroft advised me we had rights, that we had sent a telex on April 28th which said that our rights flowed from an assignment from Mr. Cooper and I was aware that there were two pictures which I believed were still protected and were not in the public domain.

Q. My question to you, again, Mr. Hadl, is: With that knowledge, did you discuss the rights that DDL, Paramount and Major Cooper had in King Kong with Mr. Kroft prior to the meeting on May 6th?

A. No.

Q. All right.

A. The answer is that I got that big stack of documents and that I recollect was sometime later on.

Q. You were testifying, Mr. Hadl, that you talked to Mr. Sheinberg about what happened at the meeting on May 6th. You recall that?

A. Yes.

Q. And you testified, as far as you recall, the question of rights in King Kong was not brought up by you?

A. I said, to the best of my recollection, it was not discussed.

Q. He didn't bring it up, you didn't bring it up.

Now, after your report on the May 6th meeting,

when was the next time you spoke to Mr. Sheinberg on the subject that we are discussing here today?

A. I can't say for certain. I can only speculate.

Q. What's your best educated guess. I am not interested in you just pulling something out of the air. You know certain things. You know you had a meeting to which you invited Mr. Sheinberg on May 21. We have a conversation now on May 6th.

So if it will help you, let me ask you this: Prior to telling Mr. Sheinberg and Mr. Arakawa and Mr. Lincoln were coming to town and you had invited them to have lunch, did you have any conversation with him at all between your report on the May 6th meeting and making the scheduling arrangements for the May 21st meeting?

A. Mr. Kirby, I think I would be speculating and I don't think you want me to do that.

Q. Your answer is that you don't recall any conversation?

A. That's right, I don't recall any specific conversation.

Q. When you called Mr. Sheinberg to arrange his attendance at the May 21st meeting, what did you say to him and what did he say to you?

A. I told him that Mr. Lincoln and Mr. Arakawa were coming to Los Angeles, that they wanted to have lunch with

us and I requested them to attend.

I told him that -- I guess I'm speculating again. My best recollection is I told him I thought they were coming to Los Angeles for the purpose of working out an agreement with us.

Q. Did you have any further discussion?

A. With Mr. Sheinberg?

Q. Yes.

A. Not that I recall.

Q. Did you alert Mr. Sheinberg in that conversation that questions had been raised about Universal's rights in King Kong?

A. Not that I recall.

Q. You had your luncheon meeting and I assume that after that meeting you and Mr. Sheinberg found the occasion to exchange a few words about the meeting?

A. I'm certain we walked right back to our offices together, so I would assume we did.

Q. Do you recall talking to him about what had transpired at this meeting?

A. I recall that both of us were surprised that both Mr. Arakawa and Mr. Lincoln had come all the way from Seattle to Los Angeles and sat through a two hour lunch for the purpose of saying thank you very much. We are not interested in any arrangement. I felt Mr. Lincoln could

have easily handled that in a five minute telephone call, two minute telephone call.

Q. Did you and Mr. Sheinberg discuss anything else?

A. I think it would have been a mutual decision, we'll file the complaint.

Q. Did Mr. Sheinberg direct you to file the complaint?

A. You can say that. I think that would have been my recommendation as well.

Q. And that took place as you were walking back to your offices?

A. Correct.

Q. Once you returned to your office on May 21st, did you have any further discussion whatsoever on these subjects with Mr. Sheinberg before filing the complaint on June 29th?

A. I don't recall.

Q. So it's fair to say that at the time Universal filed this complaint that to the best of your knowledge you had never alerted Mr. Sheinberg to the fact that questions had been raised about Universal's rights in King Kong?

A. That's correct.

Q. Now, you have told us, Mr. Hadl, that you had a conversation with Mr. Sheinberg about Tiger sometime, in your best judgment, best recollection, before May 6th and

Q. So when you found out about the Tiger license you also found out that steps had been taken to terminate it; is that correct?

A. That's correct although you're -- yes.

Q. Was it kind of simultaneously?

A. To the best of my recollection, Mr. Adler or Miss Sifuentes came to me and said we have discovered we have this license and we are taking steps to terminate it at the same time.

Q. And that was your first knowledge about the Tiger license?

A. That's correct.

Q. Now, Mr. Hadl, this morning you testified that Mr. Adler had incurred the rath of Mr. Sheinberg by first advising him that there were no King Kong licenses outstanding in the eletronic game area and then being forced to admit that there was a license; do you remember that testimony?

A. Yes, I do.

Q. How did you find out that Mr. Adler had so incurred Mr. Sheinberg's rath?

A. I think I have testified that I advised Mr. Sheinberg about the Tiger matter and when I advised Mr. Sheinberg about the Tiger matter Mr. Sheinberg advised me that he was very surprised and very shocked because Mr.

Adler had advised him that there were no -- just as I have indicated -- that there were no King Kong home video licenses outstanding.

Q. I see. Did Mr. Sheinberg tell you when he had had that conversation with Mr. Adler?

A. To the best of my recollection, Mr. Sheinberg had that conversation with Mr. Adler after the luncheon with Mr. Greenberg on the 27th.

Q. Did Mr. Sheinberg tell you prior to the time you called him and told him that there was a license still in effect that he had had that conversation with Mr. Adler?

A. No, I don't recall that.

Q. So is it fair to say that based on what Mr. Sheinberg told you that Mr. Sheinberg had been investigating the status of the use of the King Kong property during the period April 27th and the time you had a conversation with him about Plaintiff's Exhibit 15?

A. Mr. Kirby, I don't think that's correct at all. I think what I recall is that when I advised Mr. Sheinberg about this matter Mr. Sheinberg became upset, as I was upset. He became upset for two reasons. One, that such an agreement existed and, number two, that Mr. Sheinberg and not I, Mr. Sheinberg advised me that he had asked Mr. Adler not about -- not the way you describe it. He had said to Mr. Adler have you given anybody else home video rights in

King Kong and Mr. Adler had said no and that was after the Greenberg lunch which Mr. Sheinberg advised me about when I went to him with the Tiger situation.

Q. Okay. And when you had this particular conversation with Mr. Sheinberg, did he say we have to do something about the Tiger license because we want to agree with Coleco, in words or in substance?

A. It's hard for me to pinpoint exactly when the conversation occurred or when a conversation occurred. But it wasn't a question that we had to do something about the Tiger license because of Coleco. The understanding with Coleco was that we were giving them a covenant not to sue, which was not in our judgment, a license. Now, you and I have gone through this in my deposition about whether or not we can characterize the Coleco agreement as a covenant not to sue or a license. Putting that aside for a moment, it was not viewed by us at that time as legally inconsistent to have a legal license with someone and a covenant not to sue somebody else.

Q. So your testimony is that you and Mr. Sheinberg, when you alerted him about the existence of the exclusive license with Tiger, didn't discuss whether that had any impact on your arrangement with Coleco; is that your testimony?

A. No. I didn't say that.

Q. Okay.

A. That's not even a fair inference. We did discuss, to the best of my recollection, the question of the impact of this, of the Tiger situation, on Coleco and I think I have just responded in giving you what we concluded as a legal matter.

Q. You and Mr. Sheinberg had that legal discussion and reached the conclusion you have described, right?

A. That's correct.

Q. About Coleco?

A. That's correct.

Q. Did you have in that discussion any further words on the subject of whether having the Tiger license was a good thing or bad thing for Universal?

A. Good thing or bad thing, no.

Q. Commercially useful.

A. I am having trouble with commercially useful. You mean I was going to return money?

Q. Yes, for starters.

A. I think, as I have indicated in a subsequent meeting I had with Miss Sifuentes, the concern I had about it was it was an agreement in which I thought a valuable property had been licensed for a relatively small amount of money.

Q. And that conversation was sometime in the sort

of May, 4, 5, 6 area?

A. With Miss Sifuentes?

Q. Yes.

MR. FAIRHURST: Objection to the form.

THE COURT: Overruled.

A. Let me ask you, Mr. Hadl: Do you know when that conversation with Miss Sifuentes was, that's the meeting where you got really angry with her, right?

A. I am not certain whether it was May 4, 5 or 6 or maybe whether it was in the following week.

Q. Now, you said that you told her that King Kong was a valuable property; is that correct?

A. That's correct.

Q. Did you tell her on what basis you had formed the opinion that King Kong was a valuable property of Universal's?

A. The basis I had formed the opinion was the advice of Mr. Kroft. Did I tell her that? To the best of my recollection, I don't recall.

Q. Let's be sure that we both understand what's being said, Mr. Hadl.

Mr. Kroft told you that King Kong was a valuable property?

A. I'm sorry. All right.

Q. That King Kong was a valuable property of

Universal's, you didn't mean that, did you?

A. No. Let's go back.

Q. On what basis did you form your opinion, expressed to Miss Sifuentes, that King Kong was a valuable property of Universal's?

A. I would have to say that that's just my own personal judgment as I would say to you that ET or Jaws is a valuable property of Universal. In the business we are in, those are the assets of the company. Those are the crown jewels if you will. Those are the things that we have to protect. That's the property which we license and which we own and which we -- and by which we earn income.

Q. Okay. Thanks, Mr. Hadl. I appreciate the education.

Now, you, at the time you expressed that opinion to Miss Sifuentes, didn't have a clue to what royalty agreements Merchandising Corporation of America had entered into with respect to any Universal properties, did you, May of 1982?

A. Are you talking about King Kong or any properties?

Q. I am talking about any properties?

A. A clue?

Q A clue.

A. I'm sorry. I would have to have the question.

A. That is correct.

Q. After May 12, indeed after May 8, there came a time when you heard back from Tiger, is that correct?

A. That is correct.

Q. And that was the series of three letters?

A. That is correct.

Q. That you got all at or about the same time?

A. That is correct.

Q. And in those letters, which are all in evidence, Mr. Hadl, in one of those letters Tiger's attorneys said -- and this is in Plaintiff's Exhibit 21 A -- that they were perplexed with Universal's, MCA's claim of right in the ownership and control of the title King Kong in the United States.

Do you recall that?

A. Yes, I do.

Q. Did you ever respond to this letter in writing?

A. The answer to that is yes. I believe that at my deposition I wasn't clear about it, but I have since -- my recollection has since been refreshed.

Q. And your recollection now is that you did respond?

A. Yes, I did.

Q. Is that response what is in evidence as Plaintiff's Exhibit 22?

A. That is correct.

Q. And in that letter did you say anything at all on the subject of MCA's rights in King Kong?

A. No. You just ignored that part of the letter that was sent to you?

A. That is correct.

Q. Did you call Mr. Kroft upon receipt of the May 18 series of letters, including 21 A, where the question about Universal's rights was raised?

A. To the best of my recollection, no.

Q. I'm sorry?

A. To the best of my recollection, no.

Q. Did you talk with anyone about the question raised in that letter?

A. Which question?

Q. That question, the question of Universals rights?

A. In King Kong?

Q. Yes.

A. To the best of my recollection, no.

Q. And I take it that answer and your previous answer also encompass Joe DiMuro. You didn't talk to him about that?

A. I'm looking at the letter again trying to see whether there is anything in it which would refresh my recollection that I might have consulted somebody else on

it. I think the answer -- again, the answer is no.

Q. Okay. And the date of your letter in response to the Tiger attorneys is May 20, 1992, is that correct?

A. That is correct.

Q. That day is the day before the lunch with Mr. Steinberg, Arakawa and Lincoln, is that correct?

A. That is correct.

Q. You didn't have a meeting, a prelunch meeting on May 21, with the Tiger representatives, did you?

A. Pardon me?

Q. On May 21 --

A. A prelunch meeting with the Tiger representatives?

Q. With the Tiger representatives. Did anyone from Tiger come to Universal City Studios and meet with you on May 21?

A. Before I had the lunch with Mr. Steinberg and Mr. Arakawa and Mr. Lincoln, the Nintendo lunch.

Q. Yes?

A. To the best of my recollection the meeting that occurred with Mr. Rissman and Mr. Kaplan, the Tiger people, came subsequent to that time after Mr. Rissman had gone to Japan-- pardon me, I think it was Hong Kong -- to have the game redesigned, and when he brought the demonstration product back, which we looked at at the Sears Roebuck store.

I don't recall a meeting with the Tiger people before May 21.

Q. I wouldn't have thought so, either, but I wanted to ask you to make sure there wasn't a meeting on May 21 with the Tiger people.

A. Not to my recollection.

Q. Indeed, you didn't have a meeting with them until sometime after that when Mr. Rissman came back from Hong Kong?

A. That is correct.

Q. Okay. And your letter of May 20, 1982, expressly reaffirms the position taken in your telex dated May 7 that the contract between the parties has been terminated because of a material breach thereof by your client. Is that correct?

A. That is correct.

Q. So it is fair to assume, isn't it, Mr. Hadl, that on May 21, insofar as Universal was concerned, the Tiger agreement was still terminated?

A. Well, that is correct, but there is also a following paragraph.

Q. You say you are willing to talk about settlement?

A. That is correct.

Q. But on May 21 they were terminated?

A. May 21 or May 20?

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Q. May 21. You sent a letter May 20. May 21, the next day they still were terminated, right?

A. To the best of my recollection, yes.

Q. And to the best of your recollection they remained terminated until you had your meeting with Mr. Kissman, right?

A. Well, it was a termination on our part. They didn't accept the termination.

Q. I understand.

A. Okay.

Q. I understand. But Universal considered the contract terminated?

A. That is correct.

Q. Mr. Hadl, I want you to think very carefully about this.

Prior to the meeting, the luncheon meeting on May 21, did you and Mr. Sheinberg have any discussion about Tiger?

A. I don't recall.

Q. Did you have any discussion with Mr. Kroft about Tiger?

A. On that specific day?

Q. On that specific day, May 21.

A. You can refresh my memory, but at this moment I don't recall.

while I might have felt that we could do that and enter into a covenant not to sue with Coleco, if we nevertheless got into litigation over that question that was a less desirable result than a result in which I worked out agreement or arrangement with Mr. Kaplan so that his client was able to market his product and we were able to also work out the arrangement with Coleco and both parties went away happy.

Q. You had a good faith basis for your termination telex to Tiger, didn't you?

A. Yes, I did.

Q. And when you sent it you also considered the license a lousy license, right?

A. Yes, I did.

Q. But by May 20 you changed your mind?

A. No, I hadn't changed my mind. I still considered it -- I considered it a bad arrangement in light of the arrangement that was then pending with Coleco.

Q. Then I misunderstood you. I thought you said forgetting Coleco, forgetting anything else, it was a misuse of your valuable property to let it go for that small amount of money?

A. On an exclusive basis.

Q. Okay.

A. Yes, on an exclusive basis for sure.

Q. By the way, there isn't any doubt in your mind, is there, that between at least May 8 and May 20 Universal had in its view terminated Tiger?

A. You have asked me that a couple of times, and I think you pointed out that in the first telex we didn't tell them they were terminated.

Q. That was the second telex. The first telex was May 4. At the time you sent the termination telex, at least until you began having some second thoughts expressed in your May 20 letter, Tiger was terminated, right?

A. Yes. I said that we terminated them. By their letters of the 18th they didn't regard themselves as terminated.

Q. Did you inform Mr. Mittelman that you were going to terminate Tiger?

A. Not to my recollection.

Q. Did you inform him that you had terminated Tiger?

A. Not to my recollection.

Q. Did you inform MCA's accounting department that you had terminated Tiger?

A. Which accounting department, the Merchandising?

Q. Merchandising or MCA's or any accounting?

A. No.

Q. Did you circulate a memorandum within Merchandising or MCA stating that the license with Tiger

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had been terminated?

A. No.

Q. On May 21, you had no idea what, if anything, Tiger would do with its game, did you?

A. I would have to see the letters of May 18. Again, I thought one of them suggested to me that we try to settle the problem.

Q. Let me be more specific then, Mr. Hadl.

On May 21, you hadn't seen any revised Tiger art work, packaging, or new game, had you?

A. That is correct.

Q. So on May 21 you, and indeed Mr. Sheinberg, didn't know whether or not Tiger would come back with something that Universal found acceptable?

A. That is correct.

Q. Mr. Hadl, how many times did you see Donkey Kong being played, and let me put a time frame on that. I apologize for that.

Prior to June first, 1982, how many times did you see Donkey Kong being played?

A. I think that other than the time I went to the arcade with my children on none. Not I think. That's my testimony.

Q. That was the only --

A. My testimony is that apart from the time I went

to the arcade with my children, none.

Q. Did you know prior to June 6, 1982, how many game boards there were on the Donkey Kong game manufactured by Nintendo?

A. To the best of my recollection, I had in my mind that there were 50 -- I have a number in my head of 50 to 60 thousand.

Q. I am sorry, I think you misunderstood my question. I wasn't asking how many Donkey Kong games like that that Nintendo had sold. I was asking -- do you know what a game board is?

A. I must be mistaken. I thought you were referring to the arcade game.

Q. I am. I am speaking about the arcade game. I am not asking how many were sold, though. That is not what I am asking.

Do you know what a game board is on a arcade game?

A. If you mean -- the answer is -- I can tell you what I think it means.

Q. Tell me what you think it means?

A. I think it means after you put in your money and the thing is lit up it is the game board that appears.

Q. Okay.

Now, how many game boards are there in the

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Donkey Kong video arcade game?

A. There are --

Q. As of your knowledge, I am asking you now your knowledge as of June 6, 1982?

A. My knowledge as of June 6 is that there was more than one.

Q. You did you know how many?

A. Before June 6?

Q. Yes.

A. I, to the best of my knowledge, and based upon the play at the arcade with my children, at least four or five. Probably more.

Q. And did you and your children manage to achieve the level of success that moved you from the first game board to the second game board?

A. I did not. They did.

Q. And you observed the second game board?

A. Yes, I did.

Q. Would you describe the second game board?

A. At this point in time, I cannot.

Q. Did the second game board have ramps on it?

A. I just said I can't describe it, so I can't tell you that.

Q. I'm trying to refresh your recollection, Mr. Haal?

A. I see.

Q. Did the second game board have horizontal ramps on it?

A. I don't remember.

Q. Do you remember the action of the game play on the second board?

A. On the second board?

Q. Yes.

A. No.

Q. Did you know it on June 6, 1982?

A. (No response)

Q. Did you remember what it was on June 6, 1982?

A. I don't recall.

Q. You do remember that you met with the Tiger representatives and went hustling off to Sears Roebuck sometime before the Consumers Electronic show, which I believe was held beginning on June 6, 1982. Is that correct?

A. That is correct.

Q. Mr. Rissman was hot from Hong Kong with his revised game, you went out and you put it in a Sears Roebuck --

A. That is correct.

Q. And you played it?

A. That is correct.

Q. And that was a home video cartridge, right?

A. That is correct.

Q. Who played it, by the way?

A. Mr. Rissman.

Q. How many game boards did the Tiger King Kong game have?

A. To the best of my erection I only saw one.

Q. Can you describe that game board?

A. Which, the revised one?

Q. The one you saw. That's the only one you ever saw actually, isn't it?

A. That is correct.

Q. Okay. That's the one I am asking about. Describe that.

A. The chutes were gone, the game was now a horizontal and vertical one rather than a diagonal one. What continues to stick in my head is something about the way the individual -- when they jump over something was modified which made it different from the Donkey Kong game. I am not certain, but to the best of my recollection there was some change with regard to the barrels or what was being sent down, what was being sent down from the top.

Q. In the Tiger game, did the player, did the man that the player can control, jump over gaps in the board?

A. I can't give you the -- to the best of my

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recollection I can't remember right now whether that is in the one game or the other game, or whether it is in both, whether he jumps over gaps in both or whether that was the critical distinction, or whether there was some other distinction about jumping over things.

Q. Did he jump over obstacles in the game you saw?

A. I don't recall.

Q. Did he attempt to get to the top in the game you saw?

A. Yes, he attempted to get to the top.

Q. Did you have a Donkey Kong arcade game there with you in Sears Roebuck when you were looking at the Tiger game?

A. No. I said to you just a --

Q. You only saw it once?

A. I told you a little while ago I only saw it once.

Q. Who formed the conclusion at Universal that the Tiger game was no longer substantially similar to the Donkey Kong game?

A. I formed the conclusion, but based on some additional conversations, particularly with Mr. Schwefel, who had the license on the home video version of Donkey Kong.

Q. So is it your testimony that Universal based its decision to reinstate Tiger and its conclusion that the

game was not substantially similar based on your observations at Sears Roebuck, and your telephone conversations with Mr. Schwefel?

A. That is correct.

Q. You testified this morning, didn't you, that Mr. Schwefel said that the Tiger game was a bad game and that he didn't want to have any changes made because it might get better. Do you recall testifying to that effect this morning?

A. I don't recall testifying -- I recall the first part of that. I'm not so sure I recall the second part that he didn't want changes made because it might get better.

My recollection is that what I testified to is that he didn't believe the Tiger game was going to be an economic success, and he felt that bringing an action against them might only give it publicity which would add to its economic success and detract from Donkey Kong.

Q. Okay.

And that's your testimony this afternoon?

A. I can --

Q. No, I just heard it. That's your testimony this afternoon?

A. Mr. Schwefel also advised me that he said from his point of view, and I regarded him as knowledgeable the

industry, which he was, that there were many games which had at that time which had ladders or horizontal and vertical -- a kind of game in which the object was going up or down horizontal or vertical ladders.

Q. Okay. Now, Mr. Hadl, after the May 21 meeting, until the complaint was filed, you had no further conversations with Mr. Sheinberg, and you have so testified today, about that lawsuit?

A. I said I didn't recollect any.

Q. All right. I apologize. You didn't recollect any.

A. That's right.

Q. Did you yourself do any anything further with respect to that lawsuit between May 21 and the time the complaint was filed on June 29?

A. Yes.

Q. What?

A. I was in communication with Mr. Fairhurst. .

Q. Anything else?

A. We went over this morning the matter I forgot. We secured the assignment from RKO.

Q. And you testified that that was Mr. Kroft's idea?

A. That is correct.

Q. Did you ask Mr. Kroft why it was necessary?

A. Yes.

Q. And did he respond to you that it was because RKO had some position as constructive trustee for Cooper?

A. I believe I so testified this morning.

Q. Did he give you any other reason?

A. As a matter of efficiency in terms of the pleadings of the case.

Q. When he told you that, did you ask him any other questions about rights that RKO might have in King Kong?

A. Not that I recall.

Q. Did he tell you anything else about the rights that RKO might have in King Kong?

A. Not that I recall.

Q. You talked to Mr. Fairhurst, and you had that conversation with Mr. Kroft. Anything else prior to the filing of the lawsuit?

A. Well, there was the meeting with Mr. Schwefel in Chicago.

Q. Yes. You testified about that. Anything else?

A. I can't recall, but you can refresh my recollection. There may have been some further, at that point, discussions with Tiger over working out the terms of an agreement.

Q. Did you have any further contact with Nintendo?

A. After May 21?

Q. Yes.

A. I don't believe so.

Q. Is this the press release, Defendant's Exhibit 1?

A. I'll have to read it.

(Pause)

A. That's the release.

Q. Mr. Hadl, you have testified at some length that Mr. Kroft was a man widely experienced in matters relating to King Kong, is that correct?

A. That is correct.

Q. At the time Mr. Fairhurst and his firm were retained, had they done any work on King Kong for MCA Universal, to your knowledge?

A. To my knowledge, no.

I might add that I believe Mr. Kroft looked at this telex, also. I mean this press release, also.

Q. Okay.

A. I said that I think Mr. Kroft looked at this press release, also.

Q. Did you participate in the decision to retain Mr. Fairhurst and his firm?

A. Yes, I did.

Q. Did you discuss it with Mr. Kroft?

A. Yes, I did.

Q. You testified previously that you got a big stack of documents relating to the RKO litigation which you

kind of leafed through and sent to Mr. Fairhurst, is that correct?

A. That is correct.

Q. Did you send to Mr. Fairhurst any trademark searches for King Kong conducted for Universal?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

Prior to June 29.

MR. KIRBY: I meant to so confine my question. This series of questions is about prior to June 29.

A. Not that I recall.

Q. Did you send to Mr. Fairhurst, prior to June 29, 1982, the memorandum that Ms. Sifuentes had sent you with her collection of DiMuro memos?

MR. FAIRHURST: I have to interpose an objection, because let's get clear what we are doing.

THE COURT: When did you retain Townley & Updike?

THE WITNESS: I can't fix the exact date. It was certainly before June 29 of 1982. The retention may in fact have been -- and I would say as early as when I sent Mr. Fairhurst those documents and said we were going to sue Nintendo.

THE COURT: When was that? After the --

THE WITNESS: After the meeting --

THE COURT: After you received the memo dated

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the 12th of May? Shortly after that?

MR. KIRBY: I am sorry, your Honor. I am not sure which memo we are talking about.

THE COURT: Maybe I am wrong about the date. The Ms. Siguentes memo.

MR. KIRBY: That is dated the 12th. You are correct.

THE COURT: That's what you sent Fairhurst together with the materials?

MR. KIRBY: He said he didn't.

MR. FAIRHURST: My difficulty here is this. The lawsuit we can establish was brought on June 29. Work backwards. At some point we were retained. The witness doesn't know and I couldn't testify at this moment what it was, either. That's my whole point. I don't want to put myself in the position I have to testify in this case.

THE COURT: Don't worry about it. I will not be prejudiced against your client if you testify in this case.

MR. FAIRHURST: That's very nice of you, and the client appreciates that.

THE WITNESS: Yes, I do.

THE COURT: We have to establish the date at which you were retained in order to establish when the privilege attaches.

MR. FAIRHURST: That is my point.

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THE COURT: Let's stop kidding around.

Mr. Hadl, what is the best recollection you can give us as to when Townley & Updike was retained?

THE WITNESS: My best recollection is it would have been after the meeting with Mr. Lincoln and Mr. Arakawa, at which point they came back and said --

THE COURT: May 21?

THE WITNESS: Yes. At sometime after that, and before June 29.

THE COURT: All right. That is a workable date.

MR. KIRBY: Your Honor, let me suggest this. I will go on to another line and come back, but let me make --

THE COURT: I don't think you have to. All you have to do is to know at what time the Fairhurst- Hadl conversations are cloaked.

MR. KIRBY: My problem is this. The extent of the defense being raised here relating to Universal's good faith is that they relied on counsel.

Now, if that is confined to relying on Mr. Kroft --

THE COURT: It is.

MR. FAIRHURST: The other thing --

THE COURT: Let's just be clear about it. You are not -- the defense is not that they are relying on Townley & Updike, any opinion by Townley & Updike. .

MR. FAIRHURST: No. Mr. Kirby overstates it at

this point because that is not -- I think the statement if you read it back what Mr. Kirby just said there is a mischaracterization of the whole point. One of the elements in our defense in the lawsuit, an element of defense is that counsel relied on counsel in forming the opinion or making the decision to initiate suit. That is an element of it. Mr. Kirby mischaracterizes it.

The moment we begin to permit this witness to testify, if I waive that privilege, I have a problem, and I just wanted to establish the date of that. If the witness doesn't know the date how can we establish it?

THE COURT: I am satisfied the decision was made on May 21, and that you were retained thereafter.

MR. FAIRHURST: I have a constructive suggestion from Ms. Faucher.

THE COURT: As always.

MR. FAIRHURST: As always.

If the witness could be put a question whether we were retained before this bundle, this packet of material came or after, that may help.

THE COURT: I am satisfied at the moment where where it all lies, and I don't want to interrupt Mr. Kirby any further, and I'm sorry I opened my big mouth.

MR. FAIRHURST: I am not, because if you hadn't we might at that point not had any privilege.

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THE COURT: Let's see where we go from here, if anybody knows where we are.

Mr. Kirby knows. I don't.

Q. Let me show you what has been marked for identification and is in evidence as Defendant's Exhibit 27, which is dated January 3, 1983. It is a letter from did you go last C Douglas C. to House Glass Corp.

THE COURT: 27?

MR. KIRBY: Yes, your Honor. Defendant's 27. I have reviewed it.

Q. Were you aware, Mr. Hadl, prior to January 3, that the text of this letter was going to be sent to a number of Nintendo licensees?

A. Yes.

Q. Did you review the text?

A. Not that I recall.

Q. Did anyone at Universal City Studios or MCA review the text?

A. Not that I recall.

Q. Did you raise any questions about the text?

A. Not that I recall.

Q. Did you ask Mr. DiMuro to review the text?

A. Not that I remember.

Q. As of January 3, 1983, Mr. Hadl, did you know that Mr. DiMuro had advised Mr. Sheinberg that RKO owns the

visual representation of the King Kong ape?

A. As of January 3, 1983?

Q. Yes. Did you know that?

A. I can't answer that yes or no. I may have.

Q. Do you recall a time when?

A. I would say I know it today.

Q. I am not, frankly, interested in what you know today, Mr. Hadl. I am asking about January 3, 1983, and whether you can tell this court that you knew that Mr. Sheinberg had received a memorandum containing guidelines from Mr. DiMuro in April 1982?

A. No, I can't tell you with certitude that I knew that on that date.

Q. Did you know on January 3, 1983, that Mr. DiMuro had advised responsible people at Universal that the tourist attraction at Universal should be designed so that the King Kong character was not to be modeled after the ones used in either of the two motion pictures but rather was to be based upon generic apes or an ape from a zoo or from wild life?

A. The same answer.

Q. You don't know whether you knew or not, is that what your answer is?

A. My answer is as I told you, that I certainly understand that today. Whether I knew that before January

3 or after January 3, I can't tell you with a certainty.

Q. To the best of your recollection, when you read this letter did you have that in mind?

A. Mr. Kirby, you are asking me about a letter which I take it was -- which I recollect was one of several sent to other Donkey Kong licensees, other people that Nintendo had given Donkey Kong licences to, and there came a point in the lawsuit when I raised with Mr. Fairhurst a question relating to that, and I think that it is not appropriate for me to discuss that because that goes into the discussions I had with my counsel as to what should be done about that.

Q. That may indeed be a problem, Mr. Hadl, and I think it is a problem we may all have to grapple with here, but right now I am not asking you a question other than did you have the DiMuro advice to Universal, including its president Sheinberg, in mind when you read this letter, if you read it, prior to it being sent to Nintendo licensees?

A. I don't recall.

(Continued on next page)

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BY MR. KIRBY:

Q. Tell me again. Did you review the text of the letter before it was sent or did you simply know that a cease and did he as I say type letter was going to be sent by Townley & Updike?

A. The best of my recollection, and I think I so testified a few minutes ago that it's the latter.

Q. You knew a cease and desist letter would be sent but you didn't review the text?

A. To the best of my recollection I did not review the text of this letter.

Q. So to the best of your recollection, you didn't know what Nintendo licensees were going to be advised under the name of Universal City Studios; is that correct?

A. You are which licensees were going to be advised or what they were going to be advised.

Q. What the Nintendo licensees were going to be advised about Universal's rights in King Kong.

A. What Mr. Fairhurst was going to say in his letter?

Q. Yes.

A. I don't know whether I can discuss that.

Q. Well, why don't you just answer the question until someone tells you you are not to answer the question.

MR. FAIRHURST: Well, your Honor, I think the

witness is struggling here to determine where the attorney-client privilege vests and, if the witness is being asked a question as to what Mr. Fairhurst said to him or what he said to Mr. Fairhurst in this mix, I think the witness has a point. There is a privilege attached to it. If the question is did you consult with counsel, yes. Did the letter go out, yes, and if Mr. Kirby wants to ask me what the meaning of letter is I can tell him but that's not really what we are here about.

MR. KIRBY: Your Honor, may I be heard on this, because I deliberately went from the time prior to May 21 to January 3 to make what I am afraid is becoming clear from the testimony.

DiMuro says he never saw this. Hadl says now he never saw this.

We have a claim of tortious interference here with our licensees. It's based, among other things, on false representations and claims made to our licensees designed to bring them to their knees.

Now, what we are doing is being told that Townley & Updike is swinging in the wind here because Universal just sent them as an unguided missile out to do things.

MR. FAIRHURST: That's a mischaracterization and if Mr. Kirby wants to stick to the facts and the drop the

rhetoric, fine.

THE COURT: No. He doesn't want to drop the rhetoric. He enjoys the rhetoric and so do I. Go ahead.

MR. KIRBY: I am trying your Honor, as you can see, to ask the witness whether Universal City Studios approved this letter.

THE COURT: Let me ask you this? Do we care if they are going to be stuck with the letter if sticking is? There's no question it was authorized. Let me just be clear about that. You are not backing away from the letter, Mr. Hadl?

THE WITNESS: No.

THE COURT: They are stuck with it. I don't think there's any real dispute about that.

MR. FAIRHURST: Not at all.

THE COURT: Although it would be sort of fun to make Mr. Fairhurst a defendant or maybe Miss Faucher instead of Mr. Fairhurst.

MR. FAIRHURST: Mr. Fairhurst would delight in the opportunity. But I am represent ago client regretably and that's the problem with that.

THE COURT: We understand that. So I think there's no issue as to the responsibility for the letter and I think it's also appropriate to explore the state of mind of Mr. Hadl, to the extent that it can be done,

response.

Q. Did you request litigation be instituted against any Nintendo licensees?

A. Mr. Kirby, that question again is one which I discussed with Mr. Fairhurst and I regard it as starting to get into the area that's privileged.

Q. I am really not interested in you trying to protect the privilege.

MR. FAIRHURST: He is the one who holds the privilege. He happens to be an attorney, Mr. Kirby. I am entrusting him with a certain degree of responsibility, if I may put it that way.

Q. My question is: Did you instruct the institution of litigation against any of the Nintendo licensees after the January 3 letter, yes or no?

A. No.

Q. Did you know how many Nintendo licensees didn't respond to Mr. Fairhurst's letter at all?

A. To the best of my recollection quite a few.

Q. Didn't respond at all?

A. Right.

Q. Did you reach a decision not to file suit not to file suit against those who didn't bother to respond to your letter?

A. The answer is yes, I reached a decision not to

bring a legal action.

Q. When did you reach that decision?

A. I can't give you a specific date. It's after Mr. Fairhurst advised me of the responses.

Q. When was that?

A. I can't recall a specific date.

Q. A long time has gone by since January 3, 1983, Mr. Hadl. Can you tell my whether you made that decision before you met with Ralston Purina?

A. I can't remember right now when I met with Ralston Purina. If you can tell me, refresh me as to when I met with Ralston Purina.

Q. February 28, 1983.

A. February 28?

Q. Right.

A. Which is within a week of this memo from --

Q. It's within two months of the January 3 letter, which was sent out right after New Year's and February 28 is the last day of February. By the last day of February, had you reached a decision not to sue the other Nintendo licensees?

A. To the best of my recollection, no.

Q. When did you reach the decision?

A. It would have been at some point in the time frame. I don't really recollect at this moment whether I

had -- Mr. Fairhurst and I had concluded at that point that we had received all the responses that we were going to or we hadn't.

Q. Now, it's true, isn't it, Mr. Hadl, that by the end of the next month, March 30th, you had decided a follow-up letter ought to be written to Milton Bradley?

A. I recollect that there was a discussion with Milton Bradley. I recollect that we went over it at my deposition. At the moment I'm rather unclear about it.

Q. Let me show you a letter dated March 30, 1983, Defendant's Exhibit 54 in evidence and ask you if you saw that letter at or about the time it was sent out to a Nintendo licensee by your counsel.

A. The question is?

Q. Did you see that letter at or about the time it was sent?

A. I can't tell you that I did. I don't see that I am copied on it.

Q. Let me ask you this: Did you know whether or not Milton Bradley was a major licensee of Nintendo?

A. To the best of my recollection, I became aware at some point that Milton Bradley had put out a board game called Donkey Kong. To the best of my recollection, but I think it was coincidence, a representative of Milton Bradley as at Universal's offices in or about the time and

I had a conversation with Mr. Adler and I believe he advised me that the gentleman was coming in the next day as a result of which the gentleman came to my office and we had a discussion.

If I've got the right licensee. I think, to the best of my recollection, that's what happened. I asked him about the situation, explained our position, that we believed we had the rights, that we had entered into a covenant not to sue with Coleco. I don't recall at that point whether we had made similar arrangement and asked him to consider the matter. He said he was on his way to Seattle to meet with Nintendo people and he would raise it with them the next day.

Q. Did you describe the Coleco agreement to him?

A. To the best of my recollection, I did and I told him what the royalty was.

Q. Okay. Let me ask you this, Mr. Hadl: Can you account today for the fact that the only letter that Universal sent out to a Nintendo licensee following up on the January 3, 1983 letter was a letter to Milton Bradley?

A. Can I account for it.

Q. Can you tell me why that is?

A. Why to them and no one else?

Q. Yes.

A. To the best of my recollection, it involved the

fact that I had a meeting with this gentleman. But that frankly is speculation.

Q. You don't know when that meeting was?

A. Well, you and I had a conversation about it in my deposition. Remind me or refresh my recollection. At the moment I can't remember.

Q. There's been testimony in this litigation that meeting was in the fall of 1982. Does that refresh your recollection?

A. It does but it doesn't make this letter seem more timely.

Q. After you got this memorandum which is addressed to you and Sid Sheinberg, did you discuss it with Sid Sheinberg, talking about defendant's 21?

A. To the best of my recollection, no. I discussed it with Mr. Newman.

Q. Let me read you this question and answer from Mr. Sheinberg's deposition:

MR. FAIRHURST: Page?

MR. KIRBY: Page 283.

Q. "Q. Do you currently have outstanding any direction within Universal with respect to actions to be taken with respect to Nintendo licensees?

"A. I would say that the general direction that my associates understand, whether it's a direction

UNIVERSAL CITY STUDIOS, INC.

v.

82 Civ. 4259 RWS

NINTENDO OF AMERICA CO., LTD.

May 28, 1985

9:55 a.m.

(In open court)

MR. KIRBY: Your Honor, in connection with the examination of Mr. Hadl, on several points on Thursday afternoon we got into the question of the extent of the defense being asserted by Universal and consequently the extent of the waiver of the attorney-client privilege.

Your Honor, I think everything is clear now. I may be a little dense about this. I just wanted to make sure I did understand where we were and perhaps it would be helpful if I stated my understanding and then if I've mischaracterized or done anything else I'm sure someone will tell me.

My understanding is that we have charged tortious interference with our contracts and interference with our prospective economic advantage. Mr. Fairhurst is correct that he's raised various defenses, legal and some factual, to those claims. But one of the defenses is that they were privileged to do that because they were acting on advice of counsel.

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Now, the same issue, obviously, underlies our claim for exemplary damages. We have taken the opposite position. We have said they were not privileged because they were not acting in good faith, indeed, they were acting in bad faith. It is my understanding, based on the dialogue among counsel and the court, particularly the dialogue beginning at around 800 and going through 810, the subject was revisited several times that it is the court's understanding, confirmed by Mr. Fairhurst, that the advice of counsel to which Universal is pointing is the advice of Mr. Kroft and that they concede having interjected that defense in the words of the cases they have waived the attorney-client privilege with respect to that.

And I indeed had been inquiring of both Mr. Hadl and Mr. DiMuro about that advice without objection. Once we hit a date, and I gather the date arrived at here on Thursday, was the date after the Arakawa, Lincoln, Sheinberg, Hadl meeting, May 22, that will be considered a retention date of Townley & Updike.

Thereafter, it is Universal's intention to insert the privilege about conversations of an attorney-client nature between Townley & Updike and Universal and that those assertions that are privileged will be upheld. The counterpart of that is that they are not injecting a defense of relying on Townley & Updike.

With respect to the major substantive claims we're making, your Honor, and the exemplary damage claim which we assert flows from that, that's my understanding of the defense, the limitation of the defense and the consequent limitation on me.

That's what I read from the transcript and I think that's right. If I am wrong I would like to be told now so that we can clear that up.

MR. FAIRHURST: At page 800 of the transcript I think the question was raised as to advice of counsel. We have to be clear. Advice of counsel as to what? The lawsuit was initiated June 29. The decision to take that lawsuit was made in conjunction with -- I don't know if it's the 20th or 21st as Mr. Kirby puts it. We'll say that is a good working date for the purposes of determining whether the privilege attaches.

So if the question before the house is whose counsel is being relied upon for the determination as to whether suit ought to be brought, my understanding is identical to Mr. Kirby's. We are talking about Kroft and to a certain extent ~~dim~~ Di Mura internally as to the advice he gave and indeed that's why he was produced here.

If Mr. Kirby is fixing on well, the decision to write other Donkey Kong licensees, that decision -- I don't want to use the word decision -- the act of doing so, the

act of writing those letters, was done approximately nine months after the lawsuit was in progress and Mr. Hadl has testified that that was done in conjunction with counsel.

But the lawsuit already existed and that decision to write licensees it would seem to me for argument purposes here would flow naturally from the decision to bring the lawsuit.

If the lawsuit was maintained in good faith and brought in a honest belief and was not a sham lawsuit, which we contend it was not, then the decision to notify other licensees that Nintendo then had outstanding or subsequently developed would also follow from it.

It's not a point of issue necessarily. It's a statement of clarification, because I am not certain that the two are as separate as Mr. Kirby suggests in the argument he makes.

MR. KIRBY: Your Honor, I think that I understand what Mr. Fairhurst said and I think that what he's saying is in your Honor's words that if these letters are -- shorthand -- bad faith letters that Universal is stuck with them because they flowed naturally out of the bringing of the lawsuit and if we make out our case that bringing of the lawsuit was in bad faith these letters are just further evidence of that, that Townley & Updike, while the author of the letters was simply carrying out in effect

what Universal wanted them to do and that since they are stuck with that, that Townley & Updike on behalf of Universal is now not going to assert independently that Universal is relying on them and, therefore, it's a good faith reliance on counsel, that we are all back to Mr. Kroft and as Mr. Fairhurst correctly pointed out, because they made these statements, whatever reliance they had on Mr. DiMuro.

And so that I will not be -- your Honor sustained the privilege when I attempted to go into the January 3rd discussions between Mr. Hadl and Mr. Fairhurst and I understand the sustaining of the privilege is on the basis that Mr. Fairhurst has set out, that while they have inserted the defense of good faith reliance on counsel that defense is confined to Mr. Kroft and ~~dim.~~ DiMuro

MR. FAIRHURST: I am not going to repeat what I have just said before although it seems to me that there's a problem with the logic that Mr. Kirby is pursuing, because as I see it, any trademark case in which an action is taken, the decision to bring suit against X, the alleged trademark infringer, which is subsequently followed by a decision to send out letters and putting Y, Q and P on notice, Y, Q and P being licensees of X, would automatically invoke the potential of a lawyer who is defending or prosecuting, in this action prosecuting the

main claim, would automatically put him in jeopardy of having to testify in the case as to what his advice was to the client as to the writing of those it is letters and I'm not certain that that's the law. I can't resolve that today.

I think that's what Mr. Kirby is getting at here. I don't know if your Honor wants to resolve that either. I have a problem with the logic of Mr. Kirby's argument and that's the problem.

THE COURT: Thank you all very much, very helpful.

MR. KIRBY: Your Honor, I take it that the ruling still is that I should not inquire --

THE COURT: Do whatever you want to do. We'll let the chips fall where they may. Who knows, I may reverse myself. I may go in circles, backwards, forwards or I might even be consistent. God only knows. I think I know where I am. History will teach whether I was correct in that belief or not.

MR. KIRBY: Thank you, your Honor.

ROBERT DONALD HADL, resumed.

CROSS-EXAMINATION (CONTINUED)

BY MR. KIRBY:

Q. Mr. Hadl, we heard testimony from you on Thursday on a number of occasions about the Tiger license

and your reaction to finding out about the Tiger license.

Now, Mr. Hadl, you were involved in the negotiations of the amendment to the Tiger license, were you not?

A. That's correct.

Q. And, Mr. Hadl, it's true, isn't it, that the amended Tiger license called for a reduced royalty payment to Universal for the balance of 1982; is that correct?

A. That's correct.

Q. And that that royalty payment in the case of cartridge, the home video cartridge, went from 6 percent to 3 percent and for the tabletop game went from 5 percent to 2 and a half percent?

A. Mr. Kirby, I don't recollect precisely what the numbers were but I'll assume your representation is correct, without seeing the license again.

Q. You approved this amendment?

A. Yes, I did.

Q. Now, Mr. Hadl, can you tell me today how many cases the Rosenfeld firm is representing Universal or MCA in?

A. At this moment in time?

Q. At this moment in time.

A. When you say representing MCA, do you mean cases actually in litigation or potential claims; what number do

you want?

Q. I guess, Mr. Hadl, I am talking about cases that fall directly within the ambit of your responsibility as supervisor of outside litigation. How many cases actively in litigation filed in a court is the Rosenfeld Meyer representing Universal/MCA on?

A. That's hard for me to estimate at the moment because I have to consider a variety of subject matters. If you'll give me about 30 seconds to let me think.

(Pause)

A My own best estimate at the moment would be approximately 50.

Q. 50?

A. Yes.

Q. Are those cases in state and federal courts?

A. That's correct.

Q. Are they all in California?

A. I have to think again. You say are they all in California?

Q Yes.

(Pause)

A I think the majority of them are in California. There are some that are not.

Q. Can you tell me where some of those that are not in California are filed?

A. When I said there are some that are not in California. They have had an associate role, that is to say, there have been other counsel retained.

Q. I am sure.

A. They followed cases. There was one recently in Chicago. That's the one I was thinking of.

Q. Any others.

A. When you say involved, you mean that their names are on the papers?

Q. Yes.

A. At the moment I can't think of any other and on the one in Chicago I am not clear their names are on the papers.

Q. Does Universal have other litigation pending in which the Rosenfeld firm is not involved?

A. Yes.

Q. Did you ask Mr. Kroft to represent you in this action against Nintendo; yes or no?

A. Will, I'm confused as to the time frame you are asking the question about, because we did ask many after he played the game to prepare the telex and I'm not clear about what --

Q. I'm sorry. Let me clear that up.

Did you ask Mr. Kroft to file this complaint for you?

A. In this court? No.

Q. In any court.

A. Originally, as I think I testified on Thursday, I asked him to go ahead and prepare the complaint. I did not ask him to file the complaint in this court.

Q. Did you ask him to file this case, this complaint, which he prepared in any court, any court?

A. No, I did not.

Q. Did Mr. Kroft tell you, in words or substance, that he would prefer not to represent you in this action if it were filed in California?

A. No, he did not.

Q. You testified, Mr. Hadl, that Universal was interested in obtaining a speedy resolution of its claim against Nintendo; is that correct?

A. That's correct.

Q. Did Universal at any time file a motion for a preliminary injunction?

A. Against Nintendo, no.

Q. Well, against anyone else involved with Donkey Kong?

A. No. I think the reason we didn't file for a preliminary injunction was at that time -- and again this goes to advice of counsel but I guess I can speak about this. The game had been on the market for some many months.

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It had been on the market at that point in June of 1982, it had been on the market for approximately a year. Most of the machines were out there. It was our best judgment at that moment that we would not be able to obtain a preliminary injunction.

Q. Other than what you have testified to and that is that you were interested in obtaining a speedier resolution, is there any other reason why you and Mr. Kroft decided this bring this action in the Southern District of New York rather than in any other federal court?

A. Mr. Kirby, to the best of my recollection that was the reason we decided to bring the action here.

Q. Did you consider the state of the calendars in any of the other federal district courts?

A. I testified on Thursday that at that time Mr. Kroft was involved with us in the Sony Betamax case and it was his judgment and mine, after considering the matter, that we, as I have indicated, that we would be in a better position to get a quicker resolution here in New York than we would in California.

Q. Did you discuss, you, Mr. Hadl, with any representative of Coleco the question of whether or not Universal would seek a preliminary injunction?

A. To the best of recollection, I shared with them my view that I would not seek a preliminary injunction.

Q. It's true, isn't it, that Coleco was interested in Universal not bringing a preliminary injunction?

A. Against Nintendo?

Q. Against Nintendo.

A. I am not -- I don't recollect that.

Q. Mr. Hadl, you did testify on Thursday that your understanding of the April 27th lunch between Coleco and representatives of Coleco and Mr. Sheinberg, that it was to discuss a general, overall business matters, that its purpose had not been to discuss Donkey Kong?

A. That's correct.

Q. Is that correct?

A. That's correct.

Q. It's also true that Coleco had been a licensee of Merchandising and that they were anxious and interested in doing things with Universal; is that correct?

A. I became aware of that subsequent to the lunch. The answer to that, to my knowledge, now, that's correct.

Q. Did you become aware of that immediately after the lunch?

A. Of what?

Q. That you just said that you were an aware of of, that Coleco had been a licensee of Merchandising and they were anxious and interested to do more things with Universal.

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A. I would say that my knowledge of Coleco being a licensee and aware of doing more business with Universal I became aware of after the lunch but as these evolved.

Q. You have testified you have had various conversations with Mr. Schwefel, Mr. Hadl. Did Mr. Schwefel tell you in words or substance during any of these conversations that Coleco did not want the Donkey Kong matter to impair future business dealings between Universal and Coleco?

A. He didn't say that in specific words. My own view is that the decision of Universal and Coleco to arrive at a settlement of what was an outstanding difference was certainly evidence of an intention of good faith on both parties to try to resolve a problem and to continue a business relationship.

Q. During any of those conversations with Mr. Schwefel, did you ever have any understanding about what Coleco's marketing goal was for Colecovision?

A. I can't answer that at the moment because I don't know what you mean by Coleco's marketing goal.

Q. Did Mr. Schwefel tell you things like this, in words or substance: We expect to sell a million Colecovision games with Donkey Kong cartridges?

A. I don't recall any estimates of being made along those lines.

I recall estimates of how many cartridges they might tell but I don't recall the combination of the way you just put it of machines and cartridges.

Q. How many cartridges did he tell you he thought he was about to sell?

A. I would have to try to recollect and do the numbers again. My best recollection is that they hoped, of course this was on only a future hope at that time, that they hoped to sell a substantial number of cartridges.

Q. Mr. Hadl, when did you first become aware that the video game media was becoming an enormous business?

A. I had general awareness from my children who went to the arcades and played video games that -- I don't know if I would at that point call it an enormous business -- that it was a business and emerging business.

Q. Did you discuss this business as an opportunity for Universal with anyone at Universal or MCA prior to May 1st, 1982?

A. I just don't remember at this moment.

Q. Did Mr. Sheinberg discuss with you his desire to create a MCA video games division in the time period around the end of April, beginning of May, 1982?

A. Mr. Kirby, my best recollection is that Mr. Sheinberg made some decision along those lines. I don't exactly have the time frame. My best recollection at this

moment is that it was subsequent to that. I could be corrected.

Q. It's true, isn't it, that there was a video games division formed and announced on June 6th, 1982, three weeks before the complaint in this action was filed; do you remember that?

A. On your representation that that was the date, yes, I do recollect there was an announcement about that.

Q. Prior to the time of the formation of that division and that announcement, did you have any discussion with Mr. Sheinberg about the formation of such a division?

A. My best recollection is that I may have been advised about it. I had very little to do with it.

As I recall -- there was one person involved -- when you say the formation of a division, I believe essentially there was one person who was then employed already by the company that Mr. Sheinberg gave these duties to. As I recall, the reason for the announcement was the notion that if the business was emerging Universal preferred to see if they could partner in it with a joint venture basis rather than just be a licenseor of properties.

Q. Did Universal view Coleco as a possible joint venture partner at that time?

A. Yes, it did.

Q. Did it view Nintendo as a possible joint venture

the question was raised by the gentleman from Coleco, that is to say, the counsel who was with Mr. Schwefel.

My recollection is hazy on whether or not the question was also raised by Mr. Lincoln and/or Mr. McGee.

Q. But you are confident that Coleco, through its lawyer, raised the question on May 6th?

A. That's my best recollection.

Q. You also know, Mr. Hadl, and have so testified, that by May 5 Universal and Coleco already had a deal; is that correct?

A. That's correct.

Q. Mr. Hadl, you have testified that you sent on, in effect, as an intermediary a stack of documents from Mr. Kroft to Townley & Updike; is that correct?

A. That's correct.

Q. You also testified that you didn't read them or didn't read them line for line but had leafed through them in the process of acting as the intermediary between Mr. Kroft and Mr. Fairhurst; is that correct?

A. That's correct.

Q. Can you tell me whether that stack of documents contained anything that was not a part of the -- what I will generally call -- the RKO litigation?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

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A. To the best of my recollection, I don't remember. I don't remember whether there was anything in there that was not a part of the RKO litigation.

Q. Did you make more than one transmission from Mr. Kroft to Mr. Fairhurst prior to the institution of this action?

A. I may have but I don't remember.

Q. When you sent the package of RKO documents, was the draft complaint included with them?

A. I don't remember. I may have sent that or Mr. Kroft may have sent it directly.

Q. Did you read the draft complaint that Mr. Kroft prepared?

A. My best recollection is that I saw it but I would have a lot of trouble at the moment trying to recollect exactly what was in it.

Q. Let's see if we can reach an intermediate position, Mr. Hadl.

My question was: Did you read it, not whether or not you recall today what was in it but did you read it?

A. My best recollection is that I did.

Q. Was that sometime in May of 1982?

A. I'm having trouble with the time frame. My best recollection is, yes, it would have been that time frame.

Q. Did you read the complaint that was filed in

MR. FAIRHURST: Asked and answered now for the third time.

MR. KIRBY: I will withdraw the question.

Q. Did you -- I think you may have told us this already on Thursday, and if so I apologize, Mr. Hadl. I take it you did not send Ms. Sifuentes' memorandum of May 2, with its attachment, to Mr. Fairhurst prior to the filing of this complaint.

MR. FAIRHURST: Objection on the same basis.

THE COURT: Overruled.

A. To the best of my recollection, no.

Q. Did you personally tell anyone at Townley & Updike that you had had some concern about Universal's prior position on the public domain status of King Kong prior to the filing of this complaint?

MR. FAIRCHILD: Now, your Honor, I have to pose an objection, and we are now on the periphery if not in, indeed, into the attorney-client privilege, because if the privilege doesn't protect what the client tells me it protects very little of anything, and I am going to stand on that privilege.

I have to pose the objection at this point because if I don't I run the risk of a waiver, and then we will have to hear Mr. Kirby tell me that I have to produce everything in my firm's files and answer all kinds of

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questions about the conduct of the litigation, which I don't think would be proper, nor is he entitled to it under the circumstances of this case in this context.

THE COURT: Sustained.

MR. KIRBY: Your Honor, I would like to address this to the Court for possible clearing up with Mr. Fairhurst, because we've had, in addition to my other problems, a date problem. The date has been arrived at as something like May 22 as a sort of consensus between Universal and its counsel as to date of retention.

Mr. Fairhurst has written to me as part of our sometimes frequent correspondence indicating to me that it was -- and I quote this "I accept that Universal has waived its attorney-client privilege on the matter of advice given on rights in King Kong prior to the institution of this lawsuit or the bringing of this lawsuit."

I take it that what I am now hearing is that that qualified but fairly broad statement is further qualified to mean that it doesn't include anything that was attorney-client with respect to Townley & Updike prior to the bringing of the lawsuit.

THE COURT: That's the way I hear it.

MR. KIRBY: I don't want to have this letter quoted back to me in some appellate court that he had waived it and I had failed to examine.

THE COURT: God forbid this go to appellate court, but in that case my view of it is that Townley, Updike's advice to Universal is privileged.

MR. KIRBY: Your Honor, I will take no more than ten seconds on this, because it is my duty to inform you that my basis for saying that there is a waiver, and that that ruling would be incorrect, is that they had interjected Townley, Updike's advice as a defense.

THE COURT: I don't take Townley, Updike's advice as a defense for the reason it comes too late.

MR. KIRBY: Thank you, your Honor.

THE COURT: Of course I may change my mind when I get to another stage in this matter.

MR. KIRBY: I hope not.

MR. FAIRHURST: The only comment I can make is the point of the attorney-client privilege in this context does not work with mathematical certainty, and my only objection to the way Mr. Kirby puts this is the seeking for precision which we all seek, and it just is not going to work in the context of this case.

I think your Honor's ruling is correct, and it makes sense, and is workable under these circumstances.

I don't know where you go down the line with it for future questions on future issues, but it is premature to try to grapple with something not before us.

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I don't think the question Mr. Kirby put to Mr. Hadl, other than the one to which I objected and which your Honor sustained, gets into that

THE COURT: Where it gets tricky is the issue of good faith is obviously a critical issue. It can be viewed in a lot of different ways. The rubric of good faith cuts across, as I see it, all three of the claims of Nintendo.

Now, whether you call it good faith or you term it something else, as far as I'm concerned the letters of January 3, 1983, if that's the right date, although written by brother Fairhurst in an excess of zeal because of his aggressive representation of his client, I consider to be the acts of Universal, and not a privileged communication.

There is no way in which they can be privileged, and, therefore, anything relating to the sending of those I think goes back to the position taken pre -- I suppose there can be an argument that even if the decisions made prior to the filing of this lawsuit were not cloaked with good faith that the letter -- that by virtue of Fairhurst's miraculous presence and laying on of hands the January actions became cloaked in good faith.

MR. KIRBY: I am concerned that might be raised.

MR. FAIRCHILD: I realize that is what he is flirting with, and I appreciate his dilemma.

THE COURT: You can't have it both ways is the

way I look at it. I may be wrong, but, first of all, for the reasons that we have been fencing around with we don't know what that advice was. For all we know, Fairhurst may have said " This the dumbest letter I have ever written in my life, but if I have to keep the client to write the letter I'll write it."

We don't know what the circumstances of the writing of that letter are, and I think if you started to inquire -- to try to draw a line between that act, which is clearly not a privileged act in itself, and the advice rendered in connection with that, it seems to me you throw open the the entire lawsuit, because as I recall it that may have had some -- the timing of that -- well, I don't recall whether the timing -- the timing of iit had some significance. What happened here is something happened in the lawsuit.

MR. FAIRHURST: What happened was a summary judgment motion was made by Mr. Kirby. The letter was sent out January third.

THE COURT: The treatment of the letter is going to be difficult, but I don't think the letter makes any difference. When you get right down to it the position taken in the letter is simply an articulation of the position which had already been taken with Coleco, and I guess that was really the only one prior to the time of the

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filing of the complaint,.

It is a difficult problem, but if that sheds any light on anything won't it be a surprise to everyone?

MR. KIRBY: Your Honor, it does in particular -- your Honor is using the words of the cases when you say they can't have it both ways. If I am prevented from inquiring they can't turn it around and assert it as evidence of good faith.

MR. FAIRHURST: That part is true, but there is one element of this in Mr. Kirby's trial memorandum submitted in March. There is an argument, albeit a brief one, and I think we rejoindered to it, which has nothing to do with the testimony of witnesses that we have heard so far.

He claims that -- I believe if I understand the argument that the lawsuit was maintained in bad faith in some way, and I am not going to comment on the argument itself. I have already done that. I think it was en passant in our memorandum.

THE COURT: I don't think the lawsuit is particularly important in this determination, quite frankly. It is in there, but I don't see the lawsuit in and of itself as being a particularly significant factor. It was a position which Universal simply had to maintain if they were going to maintain any credibility with respect to the

position they had asserted, and they were stuck. They had to do it.

So to me the lawsuit itself isn't a critical element. It would be nice if there was some authority saying that framing a meritless lawsuit -- that is, a lawsuit which turned out to be meritless, were actionable. That would be nice.

MR. FAIRHURST: That would be a rather remarkable departure.

THE COURT: Wouldn't it? It would be helpful under the circumstances. Also, one of my brothers called me last week and suggested that there should be a rule in the District Court that no appeals to the Second Circuit are permitted except by decision of the District Court, which would be another rule that would be equally helpful under the circumstances.

MR. KIRBY: Your Honor has made a ruling, and I will go on and leave the subject, other than to say that I to an extent agree with Mr. Fairhurst that in a sense the last claim we made is a statement that under a claim based on this court's inherent equitable power and Rule 11, and there have been obviously in recent years developments, including a recent Second Circuit decision which makes it clear that the test is objective good faith, not subjective good faith, and the Nemeroff case, which does use the words

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"Maintain a lawsuit" -- that if months down the line you suddenly wake up and realize that there is no basis then there is an obligation upon the party and the counsel to do something about it, and I'm not sure that at that point there is a refuge in saying " Well, we are going to look pretty idiotic to Tiger, Coleco, and everybody else, so we better maintain the same position and keep that lawsuit perking along in the federal court."

I think there is a problem there, your Honor. I don't think, based on your Honor's rulings and Mr. Fairhurst's positions, speaking for Universal -- I take it he is, because Mr. Hadl is sitting here on the stand and I suppose could raise his hand if there were a problem -- I don't think it goes to the substantive or the punitive damage claims. We live with what we have to live with there.

On the attorneys' fees issue, Mr. Fairhurst in his statement to the court last week on 806 said that we have a counsel on counsel situation, that Townley & Updike in signing the pleadings obviously not knowledgeable based on Mr. Hadl's testimony in this complicated area, relied on --

MR. FAIRCHILD: I don't understand the last remark. I totally lost that.

MR. KIRBY: Why don't you let me finish and maybe you will understand?

MR. MR. FAIRHURST: We are in oral argument now.

MR. KIRBY: I misstated. 804.

One of the elements in our defense in the lawsuit, an element of defense, is that counsel relied on counsel in forming the opinion or making the decision to initiate suit, and my understanding of that statement when made, and when I read it, is that counsel relying on counsel is Townley & Updike relying on Mr. Kroft.

MR. FAIRHURST: Dead wrong. I saw that in the transcript, too. If there is any question on that what Fairhurst meant by it, if I said counsel I hardly didn't mean to refer to myself. I was referring to Mr. Hadl.

Since I am the author of that statement I disabuse you of that, Mr. Kirby.

MR. KIRBY: That would have been perhaps helpful, because your Honor can clearly reach a decision within the cases that in terms of carrying out Rule 11 obligations, that counsel could rely on the legitimate good faith --

THE COURT: Here's my problem. I agree with that, and I have waltzed around with the Nemeroff case from time to time, and I think it is on the fringe, but I think it is a healthy development.

On the other hand, the position does too much. It would then, if one followed that to its logical

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conclusion, completely expose the deliberations of counsel in connection with the trial. I find that is a very difficult problem.

I understand what you are telling me. I don't think that the claim in the circumstances of this lawsuit is a facetious one, or one that you can just brush aside and say "Oh, that's nonsense."

But, on the other hand, I don't know how to permit you to get the evidence to establish the claim, assuming there is a validity to it for the sake of discussion, without breaching the attorney-client privilege.

I am on the horns of a dilemma, it seems. It seems to me that in being practical about it I've got to permit the exercise of the privilege starting at some time, and then I guess thereafter bar Universal from relying on the privilege as a defense, and for my purposes it seems to me I have sort of settled on the retention of Townley Updike being as of that moment. So that's where I am.

I don't know whether that makes any sense or not, but I don't know how else to do it.

MR. FAIRHURST: It does make sense.

THE COURT: You don't know. You should not say that. You should not say that, Mr. Fairhurst. That may come back, that statement, to haunt you.

MR. FAIRHURST: I will qualify it. It makes

sense in this instance.

THE COURT: As long as you have limited it to this very narrow scope, because you can't tell how I am going to come out.

MR. FAIRHURST: I am not trying to hypothesize how you are going to come out. I'm trying to respond to a point Mr. Kirby made I have not yet responded to.

When he was referring to the colloquy in the transcript at page 804 --

THE COURT: I think that has been cleared up. You meant Hadl and Kroft.

MR. FAIRHURST: That part is true. The other part I would observe is there has to be some flexibility because under Rule 11 I have an obligation, quite obviously, to certify the lawsuit is brought in good faith. That is what he was adverting to. He wants to say Fairhurst put his imprimatur on it, that Fairhurst believed it, and he doesn't want that to taint over to the client in some way. That is the problem I think you are getting at.

THE COURT: It is going to be very interesting. This is a terrific case. I love this case. Except that it has to be decided. If it weren't for that, it would be a superb case. Marvelous lawyers, fascinating issues. Everything would be perfect if it didn't have to be decided.

Would you like to settle the case now? I guess

already was involved in talking with Mr. Fairhurst. My best recollection is the advice I received was that the law in this area was evolving and was changing, that there was some question about whether that use would support the registration.

Q. Ms. Sifuentes or Mr. Adler told you about the King Kong application that Universal had pending in connection with Tiger, didn't they?

A. I'm confused now. What do you mean by the King Kong? You mean a trademark application?

Q. The trademark application Universal had pending for a King Kong registration. Ms. Sifuentes or Mr. Adler told you about that in connection with the ongoing events with Tiger, didn't they?

A. Oh, in connection with Tiger?

Q. Yes.

A. My best recollection is that that is correct.

Q. And did they tell you at that time that they had conducted a trademark search for King Kong in September of 1981?

A. To the best of my recollection, no, they did not.

Q. Did they tell you that they had conducted a trademark search for King Kong in January of 1982?

A. To the best of my recollection, no, they did not.

Q. Did you ever ask them whether Universal or MCA

Q. For how many years does that run?

A. Its present expiration would be in 1987.

Q. Does that basically mean you can't be fired until 1987 without being paid under the employment contract?

A. No. I think I can be fired.

Q. Do you have any financial obligations outstanding to MCA?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. Within the last 6 months MCA is the holder of a first mortgage on a property I own in California.

Q. What is the amount of that?

MR. FAIRHURST: Objection.

THE COURT: Overruled.

A. $115,000.

Q. And you pay 10 percent interest on that?

A. That is correct.

Q. Mr. Hadl, you testified that sometime after this lawsuit was filed, even though you had not read the transcript of the RKO proceedings you became aware that Mr. Kroft had argued to Judge Real that King Kong was not a trademark, and that it didn't have secondary meaning, and that it was diluted and part of the ordinary English language. Do you remember that?

A. That is correct.

Q. Who told you that? Who told you that Mr. Kroft had made that argument to a federal court in California?

A. To the best of my recollection, Mr. Fairhurst did.

Q. Do you recall when he told you that?

A. No, I don't.

Q. Was it any part during the summer or fall of 1982, immediately after the lawsuit was filed against Nintendo?

A. I would be speculating to say that it was during that time.

Q. Is there anything -- can you remember the circumstances in which he told you? Was it over the telephone?

A. To the best of my recollection, yes.

Q. Did he tell you that he had had any meetings with third parties in which that subject was raised?

MR. FAIRHURST: I have to pose the objection again now, because I don't know exactly where he is going, but I think we are again at the gates, if I may put it that way.

THE COURT: Overruled.

(Continued on next page)

BY MR. KIRBY:

Q. Third parties, did Mr. Fairhurst, when he was telling you about what Mr. Kroft had said to Judge Real, tell you that that whole question had been raised by someone else, by a third-party and that he had been having discussions with them about it?

A. I'm a little confused; that Fairhurst had been requesting discussions with third parties?

Q. Yes.

A. To the best of my recollection, no.

Q. Did he tell you that lawyers for Nintendo had visited him and pointed out what had been said by Universal and its counsel and suggested that they withdraw this lawsuit?

A. No.

Q. Did he ever tell you that he had had such a visit?

A. No.

Q. Once you learned what Universal's position had been in the RKO litigation, did you take any action, Mr. Hadl?

A. I guess we're getting into this area again. Let me see if I can answer the question this way: This matter was discussed with counsel. I received advice from counsel. The advice I received led me to believe that the lawsuit

his deposition discovery plans he said he wanted Mr. Sheinberg and Mr. Hadl and he left that open.

I can tell you what my present intention is, again, subject to review and change. I am not frozen in this. It is my present intention at the conclusion of these proceedings to take Mr. Kahn's deposition testimony and move for a summary judgment. Their claims are of a different order than the claims of Nintendo in this lawsuit. They depend on a different legal basis, albeit they are arguing the same core argument now in a way on the coattails of Nintendo. They basically say they were economically coerced.

Our answer is, no, you were no not economically coerced. You knew very well what you were doing.

I do not know what discovery plans are. I know from Mr. Seltzer's letter that he makes a vague reference to somehow moving things along and what he means by that is up to him. I am not going to comment on it.

One thing I want to stress here, I would like to avoid having to do -- I don't know how we would call it, if the Coleco case were consolidated with this at this juncture, I would have the problem of not having taken Mr. Kahn's deposition. I have my two witnesses here and I cannot not keep on bringing people back and forth as if this were an irrelevant exercise.

RECROSS-EXAMINATION

BY MR. KIRBY:

Q. Mr. Hadl, to your knowledge, did Mr. Kroft confer with Mr. DiMuro prior to the bringing of this action against Nintendo on the subject of Universal's rights in King Kong?

A. I don't know.

Q. To your knowledge, did Mr. Kroft confer with Mr. Adler or Miss Sifuentes about the nature and extent of Universal's merchandising program for King Kong prior to the bringing of this lawsuit?

A. I don't know.

Q. Did Mr. Kroft, in words or substance, in any conversation from the time you called him and asked him to go play the Donkey Kong game and the time of the bringing of this lawsuit ever tell you that he had obtained documents or information from Universal with respect to the filing of this lawsuit?

A. I don't recall.

Q. Now, in response to some of Mr. Fairhurst's questions with respect to the Tiger license you indicated, and correct me if I am wrong, that what you were really talking about, when you got concerned about the Tiger game, was the tabletop game produced by Tiger; is that correct?

A. That's what we have before us, yes.

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you had Mr. Rissman with you; is that correct?

A. That's correct.

Q. Did Mr. Rissman you what changes -- your best recollection of whether or not Mr. Rissman told you what changes he had made in the course of his Hong Kong trip; yes or no, did he tell you?

A. I can't recall whether he told us or we saw them. I mean I don't know how you differentiate.

Q. Well, prior to your trip to Sears Roebuck you had never seen the gameplay, had you?

A. No. I only had these two pieces of --

Q. You had everything that was in Exhibit 53, right?

A. Yes, Exhibit 53 has a gift box and some packaging for the game cartridge and it also has a diagram of the tabletop game. On the game cartridge it shows a diagram --

Q. I am not asking you what it showed. My question was and the record will reflect this: You hadn't seen the gameplay, had you?

MR. FAIRHURST: Objection, your Honor. He didn't let the witness finish the statement.

THE COURT: Overruled.

Q. Do you understand the question?

A. I had not --

Q. -- seen the gameplay--

A On a home TV screen, correct.

Q. You had not seen the gameplay prior to Mr. Rissman's return from Hong Kong of the tabletop game, had you?

A. That's correct.

Q. The first timing you saw either was after Mr. Rissman said he had made the changes; is that correct?

A. That's correct.

Q. Now, did it come to your attention at any time, Mr. Hadl, in connection with this lawsuit, that on February 16, 1983, Mr. Rissman testified under oath as follows at page 110:

"Q. Can you recall how the building outline was changed?

"A. No.

"Q. Can you recall how the horizontal bars were changed?

"A. Yes.

"Q. How were they changed?

"A. They were made horizontal.

"Q. What were they before?

"A. They were zigzag.

"Q. Were there bombs in the pre-production game?

"A. I believe no.

"Q. So the introduction of the bombs into the game was a change?

"A. Yes.

"Q. Were there firemen in the pre-production game?

"A. There was a fireman without a fire hat.

"Q. What did the fireman look like?

"A. A fireman without a hat.

"Q. I take it that the change was to put a fire hat on the fireman?

"A. Yes.

"Q. Was the gameplay changed in any manner?

"A. No."

Was that testimony by Mr. Rissman under oath in February of 1983 in this litigation ever brought to your attention?

A. To the best of my recollection, this is the first time I've heard it.

Q. Did Mr. Rissman tell you anything different when you were meeting with him and observing the game at Sears Roebuck?

A. The answer is yes. Mr. Rissman was quite excited and anxious to demonstrate to us that he had made substantial changes in the game, that he had changed the -- I call them chutes or he calls them zigzags or the diagonal

lines. That was no longer the way in which you tried to get up the ramps to reach the top to save the -- or whatever you did once you got to the top.

Secondly, my best recollection is -- you just said something about fire bombs and that there had been barrels originally which were like the barrels in the Donkey Kong game and those were changed to fire bombs.

At the moment, I can't recollect whether there were, in fact, some other things.

Q. You don't recollect, Mr. Rissman telling you about any other changes other than those two and the fire hat on the fireman?

A. My best recollection is -- and I believe you asked me about this -- there was something about a jump button or about the way in which the character trying to save or get up the ladder could jump from one space to another.

Q. Did you point out to Mr. Rissman that the second board of the Donkey Kong video arcade game was also horizontal and had gaps in it; did you tell him that?

A. Mr. Kirby, in the testimony so far you have asked me about the question of how many boards there were on the Donkey Kong game.

To the best of my recollection, the discussion we had with Mr. Rissman concerned the first board of his

game vis-a-vis the first board of the Donkey Kong game.

Q. Can you answer my question? My question was: Did you point out to Mr. Rissman that the second board of the Donkey Kong game was horizontal, not slanted or zigzagged? Did you point that out to Mr. Rissman in your conversations with him?

A. To the best of my recollection, no.

MR. KIRBY: I have no further questions, your Honor.

(Witness excused)

MR. FAIRHURST: Your Honor, we'll call Mr. Sidney Sheinberg.

SIDNEY JAY SHEINBERG,

called as a witness by the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FAIRHURST:

Q. Mr.Sheinberg, you are president and chief operating officer of MCA Inc. and plaintiff Universal City Studios Inc.?

A. Yes.

Q. How long have you held those positions?

A. I have been president of MCA, Inc., since June of 1973. I am not totally certain whether the head of

Universal City Studios is concurrent with that or not.

Q. To whom do you report?

A. I report to the chief executive officer and the board of directors.

Q. Who is the chief executive officer?

A. The chief executive officer is Lou Wasserman.

Q. You are by education an attorney?

A. I am.

Q. Where did you go to law school?

A. I went to Columbia Law School.

Q. Did you actually practice law upon graduation from law school for a period of time?

A. I taught for one year and then I entered the corporate law department of the -- corporate law department of what was then called Review Productions, which is a predecessor company of Universal Television.

Q. What did you teach?

A. I taught legal ethics and legal research and writing.

Q. Now, turning to the operations of MCA, Inc., could you briefly describe to the court the range of activities undertaken by MCA and its family of companies? When I refer to family of companies, I mean the grouping of companies that operate under MCA and that are affiliated with it in a corporate relationship.

A. MCA is in the theatrical motion picture business, producing and marketing domestically and through affiliations with other companies internationally theatrical motion pictures. Such motion picture products are also marketed domestically by affiliates to pay television, to video cassette markets and on free television and in syndication and either through our company or through relationships with joint companies similar marketing of theatrical motion picture products takes place outside the United States.

Similarly, Universal or MCA is one of the largest, if not the largest, producer of television motion pictures and television series which it markets around the world.

MCA also owns MCA records, which markets records and tapes and the like, casettes, in the United States and through licensees around the world.

MCA owns G P Putnam's Sons and the Putnam Publishing Group, which publishes hardcover and paperback books in the United States and Canada and licenses such rights around the world.

MCA owns expense certify gifts, which is a chain of specialty retail shops based in Atlantic City and also a family of catalogues, which it operates in the United States.

We also are in the recreational services business.

We are a concessionnaire of the United States Department of the Interior National Parks Service and operate all of the concessions in Yosemite Park, Yosemite national park. Similarly, we operate the Universal Studios Tour located at Universal City in Los Angeles area.

We are also in the real estate development business, primarily involving ourselves with the development of the Universal city real estate and the development of a piece of property in Orlando, Florida, which is planned as a movie studio and theme park.

We are presently also in the toy business, through a recent acquisition of a majority of the stock in a toy company called LJN.

I am sure I have forgotten some things, but they will come to me.

(Continued on next page)

when the idea to form such a unit germinated?

A. I couldn't say it refreshes my recollection. What I would say is that I would know with certainty that assuming that fact as accurate that the entity was formed shortly preceding such announcement.

Q. Okay.

At some point in your operational responsibilities at Universal, you and Universal decided to produce a King Kong picture, is that correct?

A. That is correct.

Q. Can you tell us, so we have a point off which to fix your testimony, when that project surfaced in your mind?

A. I don't remember the year. I'm sure there has been evidence as to what -- I remember the circumstances. I don't remember the exact year. Possibly 1975, 1976. Something in that area. I'll be glad to describe the circumstances, if you wish.

Q. That is going to be my very next question, Mr. Sheinberg. Would you tell us what the circumstances were as you saw them?

A. Where shall I start?

Q. Well, why don't we start at the beginning, to use Alice's term, and when we get to the end we will know we are finished. But let's start with the notion of doing a King Kong picture.

A. All right.

I was in New York, as fate would have had it, one day when I received a phone call from a fellow who had a producing arrangement with our company, and he said "I've got this great idea, and I would like to develop and produce a movie, a King Kong movie."

I instantly thought it was a great idea. We had had some success, as I recollected with a large shark prior thereto, and I knew that there was a history of King Kong movies, and I authorized one of my colleagues in the business of negotiating deals to contact the appropriate people and endeavor to make an arrangement pursuant to which we could acquire the requisite rights to make this movie.

A deal was concluded, in our opinion, by this person whose name was Arnold Shane with executives of RKO, pursuant to which we believed we acquired the right to make a movie, options to make subsequent movies, merchandising rights, and the like.

Shortly thereafter, we found that we were in a controversy, that RKO took the position that it didn't have a binding agreement with us, that Dino DeLaurentis, or his company, had concluded a deal with them, and that they intended to -- "They" being Dino DeLaurentis -- intended to proceed to make his RKO movie.

We ended up in various and sundry lawsuits against various and sundry people in various and sundry courts. We never made that particular script. We ended up settling with Dino DeLaurentis, settling with RKO, settling some lawsuits, acquiring rights from various people, and that's a very short thumbnail of what can take an eternity to describe, and probably incorrectly.

Q. To spare everyone, and Judge Sweet, we are not going to take that eternity to do that. You mentioned early on in the response you gave that it was your intention in negotiating and doing this deal with RKO to acquire sequel rights, and you used the term merchandising rights, and that has become a term that we have heard before in this court.

Did you then have an understanding, Mr. Sheinberg, of what merchandising rights were? When I say then I mean back in 1975 when this oral deal was struck with RKO?

A. Yes.

Q. What was your then understanding?

A. Well, --

Q. Of the term "Merchandising rights." ?

A. My then understanding, and I am comfortable in testifying about my then understanding, because I don't believe my understanding has changed or ever did change,

pleadings?

A. Not that I remember.

Q. Were you routinely shown arguments of counsel and briefs?

A. I don't remember being so shown.

Q. Did you give instructions to Mr. Kroft directly as to the handling of the case and the arguments to be made?

A. No.

Q. Did you give instructions to Mr. DiMuro to in turn give to Mr. Kroft as to what arguments ought to be made, what documents ought to be cited, what witnesses ought to be called?

MR. KIRBY: Objection, your Honor.

THE COURT: Overruled.

A. I want to -- maybe this is -- I hope this is responsive. I was not the superhead of the law department. I tried to react toward Mr. Kroft and Mr. DiMuro as a client, hopefully a little more sophisticated than some client who had never ever gone to law school, but nevertheless as a client, and I didn't supervise the legal process of the lawsuit.

Q. At some point that lawsuit, in all its many and varied facets, terminated. Do you have an understanding today as to what the substantive terms of that termination were?

A. I have an understanding, yes.

Q. Would you tell us what your understanding of it is?

A. Well, the lawsuit with respect to Dino DeLaurentis was settled. It was settled based on the fact that we would refrain from proceeding with our project and a quid pro quo would be that we would receive a participation in his project. There were certain specific terms during which we would, as it were, hold back what we asserted as our rights to make another King Kong movie.

As far as RKO was concerned, my recollection is that during the course of that proceeding there was a third party involved who I think were the successors in interest to the rights of Marion Cooper. I don't know whether it was an estate or heirs, somebody representing the Cooper interest.

We acquired from the Cooper interest, if I recollect properly, all of the rights that the Cooper interest might have in the property King Kong, with the exception of publication rights, which I know they were very anxious to keep, and there may have been other more limited exceptions but we specifically acquired what we considered to be merchandising rights, if they had them.

As far as the case is concerned involving our complaint and a counter complaint filed against us, on the

one hand the court held that something was in the public domain -- I say something because it got extraordinarily complicated as to what came first, a book or the RKO film -- and a court also held in a counterclaim against us where we were charged with copyright infringement and some other kind of violations I don't remember, the court held that we had a valid contract with RKO, and, hence -- and that became a very important piece of business as far as we were concerned.

Subsequently, in the state court action, if I remember properly, where we had initially sued RKO for breach of contract, and specific performance, and the like, that agreement was settled with RKO, again under the guidance and rather stern hand of a Judge McCluskey, and I am not clear what happened with that. I know that I participated primarily in an ancillary agreement, which agreement basically involved our dropping, as I recollect it, or our settling our complaint against RKO for breach of contract, and RKO agreeing to co-finance with Universal a group of theatrical motion pictures.

That's my best memory as to what happened.

Q. You mentioned that there were claims by RKO against Universal, and you have mentioned copyright infringement. Do you have knowledge of what the other claims were today?

A. Yes. I can't characterize them in terms of legal characterization, but I remember two things.

Thing 1: We had taken out an ad indicating that we were making our version of King Kong, and it seems to me one of the things that RKO claimed in a counterclaim was that somehow caused them grievous injury.

The copyright claim was that Mr. Goldman had seen the picture and that he had even made notes, the picture being the RKO picture, and that he had made notes in the projection room as to dialogue in the picture, and that that constituted copying.

Those are the only two specifics I can remember.

Q. Do you have knowledge today, as you are sitting here testifying, Mr. Sheinberg, as to whether Dino DeLaurentis made any claims against Universal in response to the complaint that Universal filed against Dino DeLaurentis?

A. Made any counterclaims?

Q. That's correct.

A. I don't remember. I know that Mr. DeLaurentis was extraordinarily upset because the people who filed the claim apparently used a form of pleading that used the word "Fraud" in it, and Mr. DeLaurentis had this complaint translated into Italian, so he would understand it, and when he read it he was absolutely outraged that that was in

there, and I remember this incident because I called up our lawyers and I said "Must we really charge him with fraud" and I was given a lesson as to why fraud was in the complaint, but the bottom line is we dropped the word "Fraud" from the complaint. That's the only thing I can remember about Mr. DeLaurentis.

Q. When you said you called your lawyers, you called Mr. Kroft and his associates?

A. I called Mr. Kroft and said Mr. DeLaurentis is extraordinarily upset, not because we are suing him, because he understands we have to sue him, but apparently your complaint claims he did various and sundry things and it uses the word fraud or fraudulently, and that upset Mr. DeLaurentis terribly, and I said "Do we really have to accuse him of fraud? "

Q. At some point, Mr. Sheinberg, did you receive reports from -- I'm going to use this in the broadest sense -- anyone, Mr. Kroft, Mr. DiMuro, whoever -- as to the nature of the claim made by RKO over the poster and what Universal's defense to that claim was?

A. I may have. I don't remember. I always thought it was not seriously made, and I don't know that I ever paid that much attention to it, but I may very well have been alerted to it. I have no memory of it.

Q. Do you have a recollection of ever actually

AFTERNOON SESSION

2:00 p.m.

SIDNEY JAY SHEINBERG, resumed.

BY MR. FAIRHURST:

Q. With reference to Plaintiff's Exhibit 3 which is in front of you, the memo Mr. DiMuro wrote you on June 18, 1980, paragraph three has a note with reference to Paramount's merchandising rights in the name and character King Kong. When you received this memo from Mr. DiMuro, did you have contemporaneous knowledge of their then being an outstanding King Kong merchandising licensing program?

A. Yes. I was aware of the fact that we had in the settlement agreement with Dino DiLaurentiis, because I did participate in that negotiation with Mr. DiMuro. I was aware of the fact that we had agreed to not make your movie and to permit them to get the benefit of what they thought their bargain was for X period of years and I knew that Paramount Pictures Corporation was, in fact, the distributor of the picture and was handling the ancillary merchandising rights.

Now, I could not in honesty testify that I knew what they were doing. I knew they were the possessor of the rights and handling the rights.

Q. Subsequent to June 18, 1980 when you received this memorandum, did you acquire knowledge in the course of

your operational responsibilities of any projects that Universal itself had underway with respect to exploiting rights in King Kong?

MR. KIRBY: Asked and answered, your Honor.

THE COURT: Overruled.

A. I indicated earlier, I guess before the lunch break, that my present recollection is that subsequent to this date we had expended a considerable amount of monies in connection with the development of a tour attraction that we contemplated would be done in either Los Angeles or in Florida or both and based upon "the property King Kong." I know -- knew that there were a variety of conversations that had taken place over the years in connection with the production of a sequel or a King Kong movie and I had had such conversations specifically with Jennings Lang, who was preparing this project.

Q. Was he a producer?

A. Jennings Lang was a producer who had an independent production company under exclusive contract to Universal and was a very, very long time MCA executive and person with whom I had personally worked for a number of years and held him in very high regard.

Q. You mentioned the development work on a tour attraction.

How did that come to your attention?

A. I don't recall exactly when, but at a given point the recreational services people had meetings with me and indicated to me that they were interested in doing this large, what they thought, very highly exploitable attraction.

And in point of fact a considerable amount of monies were spent in developing prototypes because it raised some questions that had never been confronted by us before, such as can you have hair that lasts actually long enough to actually use in an attraction.

I wouldn't be surprised that we spent somewhere between a half million dollars and a million dollars. We actually built a head of an ape. We designed the attraction and we had intended to actually open that attraction, as I recollect, a year or two ago.

Q. Where does the project stand today?

A. We didn't get the cost of the project for California down to where we hoped we could and particularly at a point where the tour business seemed to be suffering a bit and we have continued to hold the project in mind as a project that we would do either in Florida, initially, or in California or both. We still regard this project as probably the best project we've got.

Q. In conjunction with that project, by which I mean the possibility of having the King Kong tour, did you

realities that over a period of time evolved. The realities were that Mr. DiMuro -- and I don't remember when -- ceased to be the head of the law department and became a consultant, which meant that he wasn't quite as present in mind and body and spirit to all of us and I think the other side of the coin is that I would probably emphasize myself Mr. DiMuro -- I'm sorry -- Mr. Kroft because I had lived through all of these wars with Mr. Kroft, who was our outside counsel on this matter.

In a similar fashion, if somebody were to ask me tomorrow, I would probably include your name on the list.

Q. You mentioned this project that Jennings Lang had discussed with you or a King Kong motion picture. What became of that project?

A. Well, two things became of the project. Thing one, although we had hired an extraordinarily expensive writer and had committed hundreds of thousands of dollars to commission the script. I felt, when the script was shown to me, that the script was very disappointing.

Thing two, Mr. Lang suffered a most severe heart attack, the result of which is that he is totally incapacitated and cannot speak and the combination of those two things kind of stopped that project. I should add that during that period of time and I am not sure when that period of time starts, as I indicated earlier, there were

also conversations with Mr. DiLaurentiis, who was also interested in doing another King Kong and Mr. DiLaurentiis was interested in our discussing -- in discussing with us our coproducing it with him.

I think there was a point when Mr. DiLaurentiis prepared a treatment, which I believed we financed, on King Kong in Russia, because Mr. DiLaurentiis got it into his head that that's where he wanted to do it probably only because it was so difficult to do it there. Mr. DiLaurentiis is attracted to projects that are hard to do.

Later Mr. DiLaurentiis again approached us about making some form of arrangement with him and to the best of my knowledge there presently exists an arrangement with Mr. DiLaurentiis licensing Mr. DiLaurentiis -- and I don't intend to testify as to precisely what is being licensed to Mr. DiLaurentiis -- some arrangement with Mr. DiLaurentiis with regard to King Kong.

Q. This is of a more recent origin?

A. This is I would say of a contemporaneous origin.

Q. Back to the Jennings Lang project.

Did you have occasion, in conjunction with that project, to seek legal advice from Mr. DiMuro about it? Let me see if I can refresh your recollection, Mr. Sheinberg, by putting in front of you what has been denoted here as Defendant's Exhibit Number 89.

A. As I indicated earlier, whenever I had occasion to speak with anyone on anything involving King Kong, including Mr. Lang, I would always make inquire as to the status of the rights and insist that the people I deal with do likewise.

This particular memo to me from Mr. DiMuro went to I think two questions really. Question Number 1: What situation did we have vis-a-vis RKO, because I had remembered that under certain conditions we were committed to get the permission of Mr. DiLaurentiis before proceeding with a specified type of King Kong.

If I may clarify that, because I don't know what your record has, if anything, on that. The reason for that was that RKO was concerned, when we made the original settlement agreement, that they might be subject to a lawsuit by Mr. DiLaurentiis, who claimed that RKO had reneged on them because RKO had orally promised to grant them options.

RKO had orally promised to grant DiLaurentiis options for further sequels.

So they wanted to be sure -- they, RKO, wanted to be sure -- that they were not subjected yet to another lawsuit from Mr. DiLaurentiis.

Q. RKO's capacity to grant Mr. DiLaurentiis that option was frustrated, if you will, by the resolution of

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the Universal agreement, with respect to for the Universal agreement, was made impossible because of the Universal litigation; is that what you were referring to?

MR. KIRBY: Objection.

THE COURT: Sustained.

MR. FAIRHURST: Strike that question.

A. In any event, the --

MR. KIRBY: There's no question pending, your Honor.

A. There's an answer pending.

MR. FAIRHURST: His Honor sustained the objection of Mr. Kirby to my question.

A. I had not finished.

MR. KIRBY: That does raise the continuing problem. Certainly I can understand some purpose for a narrative answer. A narrative answer that takes off on a narrow question and goes for many minutes does not afford us the opportunity to interpose proper objections and I wonder in your Honor would instruct the witness to respond to the question asked so that we can proceed with an orderly fashion.

MR. FAIRHURST: I think Mr. Sheinberg was responding to the question I put him and what I think he is suggesting that I may have prematurely cut his answer off.

THE COURT: That's the way I view it.

Q. Mr. Sheinberg.

A. I said the purpose of this memo to me, as I understand this memo, was to answer two questions. One I have spoken to, namely, what situation did we have vis-a-vis RKO as it might relate to Mr. DiLaurentiis' consent being required.

Question number 2, assuming we have the requisite rights, how should we go about doing.

Mr. DiMuro sets forth a kind of a set of guidelines which represents his view as to how we ought go forward.

Q. To your knowledge, Mr. Sheinberg, were these guidelines implemented in the sense that someone actually sat down and did a draft of the screenplay and subsequently went into production with these guidelines in mind?

MR. KIRBY: Objection, your Honor.

THE COURT: Sustained.

Q. Do you know what became of the guidelines, now they were used?

A. All I know is that I was told by Mr. Lang, when he was working on the project and I was told by Mr. Jay Stein and others who worked with him, at any point that someone would show me or talk to me about King Kong, I would say you've gotten together with Joe DiMuro or you've gotten together with Steve Kroft. Yes, I have, is

instruction, I have his guideline, I'm not sure it was instruction or guideline. Yes, we are being careful.

Q. Did there come a time, Mr. Sheinberg, when you learned of the existence of video arcade game called Donkey Kong?

A. Yes, I am sure there did come such a time.

Q. Can you tell us when that time came?

A. No.

Q. Well, did there come a time when you had a meeting with representatives of Coleco in late April -- strike that the question.

Did there come a time when you had a meeting with someone from Coleco in which the subject of Donkey Kong arose?

A. Yes.

Q. In relation to that meeting, irrespective of when it occurred, was your knowledge of the existence of Donkey Kong prior to that or subsequent to or contemporaneous with?

A. There's no question but that my knowledge of Donkey Kong, as an arcade game, preceded the meeting with Coleco, which was a lunch, as I recollect.

Q. Okay. We all know, from being here for the last week, that that lunch was on April 27th. So if you use that as a guide, if you will, in conjunction with the

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Q. Do you recall what Mr. Hadl reported back to you after you had asked him to look into it with this snippet?

A. Mr. Hadl in substance reported back to me that he had had conversations with Steve Croft, I believe, on the subject, maybe DeMuro but I don't remember DeMuro.

Their investigation led them to the conclusion that we had a cause of action or possible variety of causes of action in connection with Nintendo's arcade game.

Q. Do you remember, Mr. Sheinberg, what it was specifically Mr. Hadl reported to you about these potential causes of action or variety of causes of action?

A. Well, as I think I testified in my deposition, I knew that generally we were talking about violations of what we considered to be literary rights of one sort or other.

I don't believe that I ever inquired, and I don't believe he ever told me in any detail, and if he did I am not sure that I would have understood, you know, with great specificity, what these allegations would be.

It was enough for me to know that Mr. Hadl, who is a lawyer, has an extensive background of knowledge in all kind of copyright and trademark type areas, at least I thought he did, Mr. Hadl had looked into it and advised me that we had the rights.

The one subject that I remember more than any

other subject, frankly, was where would we file the lawsuit if we ever were to get to that point.

Q. Do you remember a discussion on that?

A. Yes, I do.

Q. With whom?

A. With Mr. Hadl.

Q. What can you tell us about that discussion?

A. Well, when that discussion later took place, which I think was some weeks or later, a decision was made not to file the case in California because the situation in California seemed to be such that it takes years and years and years to ever get to trial, and a decision was made that the case should be filed, assuming it was appropriate, in New York, because the calendars were such that we could get to court earlier.

Q. Did you yourself, Mr. Sheinberg, specify who should be handling the case in New York?

A. I did not.

Q. Were you subsequently told how the case was going to be handled in New York, by which I mean who was going to be retained to handle it?

A. Your name or the name of your firm may have been mentioned. To the best of my knowledge I had never met you nor did I know who you were.

Q. Did Mr. Croft and you have any discussion as to

where the case ought to be brought and when it ought to be brought?

A. I don't think so. It's possible, but my recollection is that to the degree I discussed this with anyone, it was Bob Hadl.

Q. And did Mr. Hadl -- excuse me.

A. I don'te want to abuse my answer, counsel, but I think it's important to note that Mr. Hadl had the specific responsibility of being the management liaison with outside counsel.

Q. Did Mr. Hadl advise you as to Mr. Croft's and his view of Universal's potential claims in writing?

A. No.

Q. After receiving this advice from Mr. Hadl, did you specifically commission him to do anything?

A. My recollection is that the ultimate decision to file a lawsuit took place after a meeting that was held with two representatives -- well, are we now talking about the lawsuit or are we talking about a wire?

Q. No, the lawsuit.

A. The lawsuit, as I recollect the decision to file the lawsuit was made, if I am right, subsequent to a meeting that took place with two representatives from Nintendo.

Q. Do you remember who those representatives were?

A. No. I believe that one of them was a relative or somehow related to the Japanese person who I understood owned or controlled Nintendo, and the other was a lawyer who was officed in Seattle or Portland or some place in the Pacific Northwest, and I believe was a kind of a general counsel to Nintendo, but not one of great authority, as it appeared to me.

Q. This was a luncheon meeting?

A. Yes.

Q. And do you recall what transpired at this luncheon?

A. What transpired at this luncheon generally was that we told them that we were of the opinion that we had rights that had been violated. It was certainly not a meeting that had to do with the details that one might have in an argument among lawyers, and we indicated to them that we were most willing to sit down and work out something even if it didn't directly relate to this particular project in the sense that we wanted to be reasonable.

Q. What was the upshot of the meeting?

A. The upshot of the meeting from my perspective was that we were really wasting our time, and that all that would happen is that more time would pass and someone would later tell us, as we were indeed told in the Sony litigation, that we had rested on our rights too long or

something of that sort, and I concluded that we ought proceed and file a lawsuit.

Q. Do you remember at that luncheon, Mr. Sheinberg, speaking to Mr. Howard Lincoln, the general counsel to whom you referred, about the Tiger arrangement?

A. I do not.

Q. Going back to the report that Mr. Hadl gave you after he had consulted with Mr. Croft and saw the game --

A. Mr. Hadl told me he played the game also. I remember that.

Q. Going back to that sequence of events, did there come a time when you subsequently met with representatives of a company called Coleco?

A. Yes.

Q. What was the occasion for that meeting?

A. I would say the occasion for that meeting was two-fold:

No. 1, the person who was the general sales manager or whatever his title was, Steve Adler, who ran the day-to-day operation of Merchandising Corporation of America, which is our merchandising affiliate, had kind of been after me to sit down with Mr. Greenberg, because he thought that we might want to discuss an arrangement that would constitute a kind of broad license of Universal controlled properties with Mr. Greenberg, whom he thought

had a company that was going to be a real comer in the video game field.

Secondarily, I think we felt, Mr. Wasserman and I, that there may be an opportunity for an involvement with Mr. Greenberg in one sense or other in the sense of our acquiring an interest in his company or maybe acquiring the company, etc., again bearing in mind that at that time video game companies were the hottest thing in America, Atari included.

And so I would say the meeting was really in the nature of a broad-based good and welfare meeting which might lend itself to some form of licensing arrangement of a broad sort or might even lend itself into some form of investment or acquisition of Coleco.

Q. Do you recall who was actually at this luncheon meeting beside yourself

A. I was at the meeting, Lou Wasserman was at the meeting, Arnold Greenberg was at the meeting, and although I had previously said that Bob Hadl was at the meeting, that is incorrect. In point of fact, he was not. Steve Adler was at the meeting.

Q. As best as you can recall, Mr. Sheinberg, what occurred at that meeting with the Coleco representatives?

A. Representative.

Q. Representative.

A. I think there was only one.

Q. Mr. Greenberg.

A. What happened was that it was a very nice lunch. Mr. Greenberg told us a bit about the formation of his company by his father, which was original originally in the house-shoemaking making business or something. He and Mr. Waserman both shared the friendship of Senator Ribicoff, and he told us about what their company was doing and he was very excited about this new product that they were bringing out on the market, which was going to be in the video game business, and at some point in the conversation Donkey Kong came up.

Q. Who raised it?

A. It is my belief that it just came up in the conversation mentioned by Mr. Greenberg.

In reviewing the files, I know that there is an indication that I received a memo that indicates I should have known it. I don't remember remembering it, and I don't remember raising it.

And the reason I have this strange memory on this subject is that when the subject of Donkey Kong came up, and as I say it's my recollection that he mentioned that they they had this hot property that they were going to market with their Colecovision product, I brought up the subject of, gee, that creates a problem for us because we

have some real concerns with Nintendo, and we believe that some rights of ours are being violated, and we had done a lot of legal research in this, etc.

And I wouldn't want us to -- you know here we are talking about a broad license, or we are talking about an acquisition of your company or debentures or whatever. I won't want us to have an adverse relationship in this situation.

Q. What did Mr. Greenberg say to you?

A. Mr. Greenberg said to me, and he smiled as he said it, he said, "What took you so long? "

Q. What did you understand him to mean?

A. I remembered that because that is a famous movie line, you know, where the hero rides off into the sunset and then somebody always comes running after him, and the hero turns around and he looks at the guy or the woman, always John Wayne or Gary Cooper or somebody, says, "What took you so long," and you do a fadeout. That line I remembered.

In any event, it was a very non-hostile, non-argumentative, pleasant lunch. He said, "Look, who handles these things for you, and have him get in touch with my man," Schwelfel I think was the man's name.

He said, "Mr. Schwelfel is --" I don't know whether he was general counsel or business affairs type but

he was a senior guy in the Coleco organization, and it was left that Mr. Hadl would get in touch with Mr. Schwelfel and these guys were going to try to work this thing out in a manner that would be to everybody's satisfaction.

Q. You subsequently reported all this to Mr. Hadl?

A. I subsequently reported to it Mr. Hadl.

Q. What did you tell him to do with respect to Mr. Schwelfel to start with?

A. I told him to get in touch with Mr. Schwelfel. I told him to explain the situation to Mr. Schwelfel, and I told him very pointedly, "I said, I am not looking for any war here. Let's see whether we can't get this thing worked out so that Mr. Greenberg is happy with it, and that we can live with it."

Q. Do you recall what happened after lunch with Mr. Greenberg?

A. Yes. Two things that I remember happened. Thing one is we showed Mr. Greenberg one of our toys that we had been working on, which had to do with an interactive video disk product, which he seemed quite impressed by.

And No. 2, he showed us some of the toys that he had brought along that related to the Colecovision product.

Q. Do you recall whether he showed you any film?

A. He showed us a number of commercials.

MR. FAIRHURST: Your Honor, at this point I

would like to ask Mr. Sheinberg to look at the screen and we will ask -- this has been marked and accepted in evidence as plaintiff's Exhibit 104 -- and ask Mr. Sheinberg after seeing it whether he can identify it for us.

(Videotape played)

Q. Mr. Sheinberg, is that the ad that Mr. Greenberg showed you?

A. It either is or it's similar to one of the things he showed us. I think he showed us more than one.

Q. Do you recall whether you gave Mr. Hadl any specific instructions as to what the form of this resolution of the issue between Coleco and Universal should be? In other words, how to resolve it, what the structure of an agreement might be?

A. I don't think so other than that as I testified to earlier.

Q. Do you recall learning at some subsequent time that the claim against Coleco had been resolved?

A. Yes.

Q. How did you learn that?

A. Well, I am sure Mr. Hadl told me --

Q. No, no. How did you learn it? Don't "I am sure." Who reported to you on it?

A. Mr. Hadl.

Q. Do you as you sit here today know the essential

or now, and that this might create some problems or it might not relative to our contract with Coleco, and I think I said something like, "Well, handle it somehow. Work it out."

Q. Was that pretty much the sum and substance of your involvement with the Tiger license?

A. Yes, other than once I think being told it had been worked out, I don't think I heard about Tiger until this lawsuit.

Q. Incidentally, when Mr. Greenberg turned to you and said, "What took you so long," what did you understand him to mean?

A. I understood him to mean that he, Mr. Greenberg, being a graduate of the Harvard Law School and highly regarded, was aware of the fact that there were problems or there might be problems between King Kong and Donkey Kong, and that he, Mr. Greenberg, had anticipated hearing from us.

Q. As a consequence of that meeting with Mr. Greenberg, did you issue instructions to Mr. Hadl with respect to bringing a lawsuit against Coleco or advising him of Universal's claim of rights?

A. Well, I think I testified to that if I understand your question. I told Mr. Hadl to get in touch with this name I had been given called Mr. Schwelfel, I think, and he did, and I emphasized, because I do remember

this this, I was very anxious to keep a very good relationship with Mr. Greenberg. I didn't want to have a fight with Mr. Greenberg, and Mr. Greenberg didn't want to have a fight with us, because we knew we were moving toward other possible relationships, which in fact we did.

THE COURT: What were those?

THE WITNESS: Subsequent thereto, we had a meeting with Mr. Greenberg in the offices of Lazard Freres here in New York which contemplated from Mr. Greenberg's standpoint at least that we make an investment in convertible debentures of Coleco which would have permitted him to get some funding that he needed and would have permitted us to participate in the growth of Colecovision.

THE COURT: Did you do it?

THE WITNESS: We did not do it. I hasten to add, notwithstanding my personal recommendation that we do it.

Q. You became aware, did you not,that a telex had been prepared by someone to put Coleco and Nintendo on notice of Universal's claims?

A. I am aware that a telex was prepared to put Nintendo on notice and that a copy went to Coleco.

Q. I am going to put in front of you what's been denoted as plaintiff's Exhibit 14, and ask you to review that document, Mr. Sheinberg.

A. Well, I know I saw this document.

others for these kinds of details.

Q. I gather it's a pretty big company you are running out there, Mr. Sheinberg?

A. It's a big company with lots of legal involvements.

Q. What were your revenues last year?

A. In excess of a billion dollars.

Q. What were your earnings last year?

A. Well, if you are going to ask me some detailed information, I would like to get our annual report so I don't end up misquoting myself. You have our annual report?

Q. I have your 10 K. Would that help you?

A. I am sure it would.

Q. Let me see, Mr. Sheinberg, if we can get to the summary page that might help refresh your recollection. Let's make it clear on the record that that's necessary. You can't recall what your operating revenues for last year were?

A. By operating revenues, you are talking about net earnings.

Q. What was your operating income for 1984?

A. Our operating income for 1984.

(Pause)

A I think our profits were around $135 million. Is that close?

Q. Well, why don't you look at page 3 of the exhibit to your 10 K at the top left hand column?

A. This is illegible.

Q. I'll read it to you, if you want me to, Mr. Sheinberg. That was the best copy that the New York Stock Exchange could supply us. I apologize?

A. Net income was $95 million.

Q. Does it state what your total earnings were?

A. That is our total earnings.

Q. What were your total sales?

A. I multiplied by the wrong figure. That's why I was wrong.

A 1.6 bilion.

Q. Thank you. What portion of your total operating income was contributed by your litigation profit center?

A. By our litigation profit center?

Q. Yes.

A. I don't know. Why don't you refresh my recollection in our annual report or the 10 K because I don't know that.

Q. Do you nave a line item for your litigation profit center?

A. No.

Q. Do you have any idea of what the net result in terms of income from litigation was for Universal or MCA

during 1984?

A. I don't know that it was a profit center at all. It may have been a loss center.

Q. What about 1983, was it a profit center in 1983?

A. I don't remember.

Q. What about 1982?

A. I don't remember. I have never seen us put together any kind of study that would give me that information to know.

Q. By the way, Mr. Sheinberg, I have been reading about you. What was your total compensation for 1984 from Universal/MCA?

A. My total compensation from MCA was $500,00 in cash plus 4 million something in vested long term stock.

Q. So was business week accurate in reporting on May 6 1985, that your total compensation, adding those figures together was $4,638,000?

A. It depends how you want to look at it.

Q. If they are not accurate you can just tell me they were not accurate?

A. I would prefer not to tell you anything. Make your own conclusion.

Q. The point is you are in court.

MR. FAIRHURST: Now, we are getting argument with the witness. This is amusing and all. What real

responsible for the tour attractions?

A. Jay Stein is the president of something called MCA Recreation. That is the group that is responsible for Yosemite, our Universal Studios tour, the Florida tour attraction,, and prior to our disposing of it he was responsible for Arlington National Cemetery and the tour in Washington, D. C., that we operated.

Q. Now, my notes reflect, Mr. Sheinberg, that on direct you said that with respect to Mr. Lang and with Mr. Stein, that there is one thing you could be very comfortable with testifying, and that is that you told them to consult with someone. Whenever someone says King Kong, I said talk to Joe DiMuro, talk to Steve Croft, be sure you have the rights we are talking about, be sure we don't infringe on anyone else's rights.

Is that the substance of your testimony?

A. That's absolutely the substance.

Q. Thank you. As you sit here today, Mr. Sheinberg, are you sure that you told Mr. Lang and Mr. Stein to consult with Steve Croft?

A. Yes. I said Steve Croft or Joe DiMuro.

Q. You are sure you included Steve Croft?

A. No.

Q. You are not sure?

A. No. I believe I testified either Steve Croft or

Joe DiMuro.

Q. You are sure that in words or substance you told Mr. Lang and Mr. Stein to consult with either Joe DiMuro on Steve Croft?

A. Yes, beyond a shadow of a doubt.

Q. And did you give them the option as to which one they were to choose?

A. I didn't think it was as much an option but I guess you could characterize it that way. I consider those two people now aided by Mr. Fairhurst as the three lawyers most knowledgeable in the world of King Kong.

Q. Mr. Sheinberg, and I am referring to page 84 of your deposition, do you recall being asked the following questions and giving the following answers beginning at line 10:

"Q. Now, as for Mr. Stein, did you tell him any specific thing to avoid in constructing the studio tour exhibit?

"A. I don't remember having so done.

"Q. Did you tell him that the ape should look in a certain way rather than another way?

"A. No. I simply -- I want to tell you what I told them because I am very comfortable with it. I told them to get legal advice. That's what I told them to get, so that we didn't depict the ape or anything else that

might be protectible.

"Q. As far as anything else, did you advise him as to the anything else which might be protectible in connection with the production?

"A. To the best of my knowledge, I neither advised Mr. Stein nor Mr. Lang beyond the giving him of a specific name as to who they should consult.

"Q. Who did you tell them to consult?

"A. Joe DiMuro.

"Q. And the rights, to make sure that we have this, that you were asking him to ascertain that they not infringe in any way, would be the rights held by RKO and the rights held by Dino DiLaurentiis?

"A. Yes. I had previously testified that I didn't know whether I said to be sure and talk to Joe DiMuro about the rights held by RKO and DiLaurentiis or whether I said call Joe DiMuro and be sure that whatever you are doing doesn't create a problem for us with regard to the rights in the property King Kong.

"I don't know whether I stated it in a cautionary way or affirmatively. I felt that I discharged my duties and I was very comfortable by saying, 'Get Joe DiMuro in the act.'"

Do you recall being asked those questions and giving those answers at your deposition?

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A. Yes.

Q. Thank you. Now, with respect to Mr. DiMuro, Mr. Sheinberg, do you recall today whether the April 8 memo was a memo that he prepared at your request or that he just popped up and prepared it?

A. I can only recall, based upon what the memo says, the memo on its face says it's at my request, if I remember that properly.

Q. All right. Now, you don't have that in front of you, I don't think, Mr. Sheinberg. Let me put defendant's Exhibit 89 in evidence in front of you. This was written on April 8, 1982.

Was this written in connection with the Jennings Lang movie?

A. I cannot testify that I remember that. I believe that, but I don't remember that.

Q. Did Universal on April 8, 1982 have any other King Kong movie under active consideration other than the Jennings Lang movie?

A. Well, as I said earlier, I can't lock in the time frame, but the only other King Kong movie with which I have familiarity, and again you must understand I am not only not head of the law department, I am not head of the merchandising department, I am also not head of the movie department, so I am only testifying about what I know about.

The only other possible movie that could have been involved would have involved Dino DiLaurentiis.

Now, the reason I can imply with reasonable certainty that it had to do with one of these movies is that another recipient of this is Mel Sattler and Mel Sattler is in charge of business affairs for the motion picture group. He would only be copied if it were somehow relevant to a movie.

A. Did you read this memorandum?

A. This memorandum?

Q. Yes.

A. Yes.

Q. And you read the guidelines?

A. Yes.

Q. And did you call Mr. DiMuro to discuss either the memorandum or the guidelines?

A. No.

Q. Did you call Mr. Croft to discuss the memorandum or the guidelines?

A. No.

Q. Did you discuss this memorandum with anyone at Universal-MCA, to the best of your recollection today?

A. No.

Q. April 8, 1982 was approximately three weeks prior to the time that you met with the representatives of

tell me, did Mr. Adler furnish you that prior to the meeting?

A. I have no recollection of it.

Q. Did you have any discussion with Mr. Adler about Coleco as a business or as a business opportunity for Universal prior to the meeting with Mr. Greenberg?

A. Well, that's a very broad question. I have testified earlier, and I want to segregate the two elements, that Mr. Adler's interest in Coleco was that there was a potential client for him to have an overall licensing relationship with.

Mr. Steinberg and Mr. Wasserman, and I suspect Mr. Greenberg's interest, was broader than that, and that is that we might become an equity owner of Coleco.

So I would think that my discussion -- I am sorry to have to be that vague but my discussion with Mr. Adler would most likely have been vis-a-vis Coleco as a licensee, not -- I am not sure that I would have shared the other type of information with Mr. Adler.

Q. I guess I was sort of focusing on what information Mr. Adler might have shared with you.

A. Well, I have already testified that I have no recollection of this.

Q. You see what's attached to that letter? Why don't you take a look at that and make sure you didn't see

them perhaps separately from the letter. And we are talking about defendant's Exhibit 2.

A. I don't have any recollection of having seen any of this.

Q. Before the meeting did you have discussions with any of your outside advisers about a possible investment in Coleco?

A. Yes. Or I may have had discussions with other people, but I don't believe I had them with Mr. Adler.

Q. First asking about your outside advisers. Did you have any discussion with any of Universal- MCA's outside advisers about Coleco and a possible Universal investment or acquisition in Coleco prior to your meeting with Mr. Greenberg?

A. I can't testify with certainty that it was prior to, during, or after. I do know one thing, that there were discussions with Felix Rohatyn of Lazard Freres concerning Coleco.

Now, I think they were beforehand, but maybe they were afterward. I just simply -- I can't make that distinction X years later.

Q. You looked at some of Mr. Greenberg's deposition testimony, is that correct?

A. Yes.

Q. Did you look at the part where Mr. Greenberg

testified that on May 7 in New York he met with Mr. Felix Rohatyn?

A. Yes.

Q. And were you there?

A. Yes.

Q. Was Mr. Wasserman there?

A. Yes.

Q. Was anyone else from Universal there?

A. Not that I remember.

Q. Anyone else in Coleco there?

A. I don't think so.

Q. Was anyone else other than Mr. Rohatyn there from Lazard Freres?

A. Not that I remember.

Q. And prior to May 7, 1982, which was, as I do my arithmetic, ten days after your meeting with Coleco, had you had any discussions with Mr. Rohatyn about investing in Coleco?

A. Absolutely. The only unknown is did I have it prior to or after the lunch that was taking place.

Q. Mr. Rohatyn is a director of MCA, isn't he?

A. Mr. Rohatyn is a director of MCA.

Q. And he was a director in April of 1982, wasn't he?

A. I'm not even sure of that.

think you still have in front of you, you're clear that that came from Mr. DiMuro and not Mr. Kroft, aren't you?

A. Unless it is an enormous forgery, yes, I am clear.

Q. Did you know that Mr. Stein apparently consulted with Mr. DiMuro after being sent out with your injunction?

A. I am very pleased to hear that.

Q. Did you know that he consulted with Mr. DiMuro?

A. Oh, I think at the time I did, because as I testified to earlier whenever somebody mentioned King Kong to me I would always say, you got legal advice on this.

Q. You see from -- I'll put in front of you Defendant's Exhibit 79, which is a memorandum from Mr. Sauber, to Mr. Stein.

A. Is there a pending question?

Q. I don't think so. I asked you to read this. You see from what's in evidence as Defendant's Exhibit 79 that Mr. Sauber was relating Mr. DiMuro's advice about how the tour King Kong character should be constructed to Mr. Stein; is that correct?

A. Yes.

Q. And that advice that Mr. DiMuro gave in July of 1982, after Mr. Stein's people consulted with him, is the same advice that he gave on April 8, 1982 to you, isn't it?

A. Well, it is what it is.

Q. I guess I am asking you a question, Mr. Sheinberg.

Is it your understanding that the advice that Mr. Stein got from Mr. DiMuro, in July of 1982, was the same as the advice that you got from Mr. DiMuro on April 8, 1982?

MR. FAIRHURST: Objection, form.

THE COURT: Overruled.

A. I have no independent knowledge. All I know is we have a copy of the memo he gave me. That's all I know about that. Now, you have shown me a copy of a memo that was sent by the lawyer for the tour division that reflects what generally seems to me to be the same advice. I can't add anything or subtract anything from those two memos. They are what they are.

Q. Is it your understanding that Mr. DiMuro's advice, as reflected in the April 8, 1982 and reflected by the Sauber/Stein memo of July 1982, is the advice under which Universal is currently operating with respect to the King Kong character?

A. Unless Mr. DiMuro has changed his advice or unless that advice has been changed by virtue of this litigation, I don't know why it would change. But I really don't know.

Q. When you called Mr. Hadl and gave him the Donkey

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A. Yes. I'm emphasizing your word only. I would prefer to say I got two.

Q. And no others that you recall?

A. Correct.

Q. Let me ask you this: Had you brought any lawsuits against alleged infringers of Universal's rights in King Kong?

A. I don't know.

Q. During the 1980-1981 and up to June 29, 1982 period?

A. I don't know.

Q. None came to your attention?

A. That lawsuits were filed to protect rights? That I read about in the newspaper and it happens every day.

Q. You didn't read anything about Universal filing lawsuits to vindicate rights in King Kong, did you?

A. Not that I remember.

Q. I guess what I am trying to find out, Mr. Sheinberg, is when you had this telex, which was the day after your meeting with Mr. Greenberg, and you are going to send him a copy of this and you had this memorandum from Mr. DiMuro, I was just asking you whether you recall today taking that memorandum into account when you read this telex.

A. To me, that memorandum would have been -- had it

been in my mind, which it wouldn't -- it would have been the difference between tunafish and chicken salad.

Q. I guess your answer is you didn't take it into account?

A. I sure didn't.

Q. Did you make any changes in the telex as proposed?

A. Of course not.

Q. And you authorized them to affix your signature to this telex?

A. Correct.

Q. When I say them, I am talking about Mr. Hadl?

A. Or Mr. Kroft.

Q. Did you recall discussing the telex with Mr. Kroft?

A. No.

Q. And I take it, from your testimony, you certainly didn't discuss it with Mr. DiMuro?

A. I don't recollect discussing it with anyone other than Mr. Hadl and had I discussed it with these other people I guess I might as well have fired Mr. Hadl, because I wouldn't need Mr. Hadl.

Q. Is it fair to say, Mr. Sheinberg, that after you told Hadl to call someone who you recall as being Schwefel at Coleco that you didn't participate in the Coleco

A. I don't remember that.

Q. Mr. Sheinberg, this agreement you had with Coleco would result in greater profits to Universal the more Donkey Kong products that Coleco sold; is that correct?

A. Yes.

Q. Do you recall discussing with any representative of Coleco the importance of making sure that nothing that Universal did would interrupt that marketing program?

A. Mr. Greenberg was very anxious that he launch his product and that his product be successful and he certainly made that clear. I don't recall any additional. He was very anxious -- I remember one thing that may or may not be responsive to your question. Mr. Greenberg was very, very anxious that, number 1, the Nintendo people not get mad at him, because he felt beholden to them because he was a relatively small fry in a world that he felt was being taken over by Atari.

Number two, that in the event we felt compelled to go against Nintendo in a legal action, we make it very clear that he was not a subject of that legal action and Mr. Greenberg wanted to and in fact did offer his good offices in trying or in wanting to try to reconcile the forces of Nintendo and Universal.

Q. Thanks, Mr. Sheinberg.

Did you learn all that from Mr. Greenberg at

Q. Do you remember having such a discussion?

A. No, other than, as I think I have indicated earlier, our desire was and I am sure this was part of any discussions I would have had, our desire was to amicably settle this thing in some fashion.

Q. And it's your recollection, I believe you testified to today, that it was after that luncheon you made the decision to sue Nintendo?

A. Sometime thereafter, yes.

Q. Did you have any further discussions with Mr. Hadl with respect to that decision you made?

A. I think -- I don't know what further discussions mean because we have not said what discussions I had with him. I think the substance of what I said to Mr. Hadl and Mr. Hadl said to me is, we're getting nowhere, we're going to have to file a lawsuit. We were given no encouragement that we were going to get anything other than stonewalled. We felt we had a case, at least so I was told and so Mr. Hadl believed. We saw no legitimate alternative.

Q. Now, after the lawsuit was filed, Mr. Sheinberg, did you have outstanding a direction at Universal with respect to actions to be taken with respect to Nintendo licensees?

A. I don't think so.

Q. Did there come a time during 1982 or 1983 that

you did have such a direction outstanding?

A. I think the only direction that was outstanding -- and I think this was discussed in my deposition -- was that I expected us to enforce those rights that we thought we legitimately had and not to waive any rights that we might otherwise have and that gets to a basic credo of mine. I think one of my mine responsibilities as president of MCA is to enforce rights which we have in literary properties. I don't feel that's a bad thing. I think that's my duty and everyone who works for the company appreciates the fact that we are to be vigilant in that area.

Q. Do you recall seeing a memorandum from Mr. Newman to you and Mr. Hadl relating to Donkey Kong and an enforcement program?

A. Do I recall it?

Q. Yes.

A. Why don't you show it to me and I'll see whether I recall it.

Q. Let me ask you do you recall receiving such a memorandum.

A. No.

Q. Let me show you Defendant's Exhibit 21 and ask you if that refreshes your recollection as to whether or not you received such a memorandum from Mr. Newman on February 15, 1983.

A. I don't really recall it.

Q. Let me ask you this, Mr. Sheinberg: You personally were involved in having Atari sign an agreement with Universal?

A. I was involved.

Q. You spoke to Steve Ross; you know Steve Ross, don't you?

A. Yes, I do.

Q. Was he the president of Warner Communications?

A. He still is unless something happened this afternoon.

Q. They own Atari?

A. Yes, they do, did.

Q. You spoke to him and told him Atari is bringing out a Donkey Kong product and they better sign an agreement like Coleco signed with us, didn't you?

A. They better sign an agreement?

Q. An agreement like the Coleco agreement with us, didn't you?

A. Well, I am quarreling with the notion that they better. Is that or else?

Q. Yes, or else?

A. I had a conversation.

Q. Or else?

A. I had a conversation with Steve Ross someplace.

If memory serves me, it was at a consumer electronics affair. Maybe it was someplace else. In the course of that conversation, I told Mr. Ross as far as we were concerned the Coleco -- the Donkey Kong property violated our rights and the major licensee had signed an agreement with us, to wit, Coleco and we would hope they would, because I didn't want to be in the position of having to sue them.

I didn't realize that later I would in fact be in such a position on another matter. Mr. Ross indicated to me that he would look into it, that he understood our position and that was the substance of it.

Q. Was that the only discussion you had with anyone at Warner Communications or at Atari with respect to their signing up with Universal?

A. I may have had a similar conversation with a fellow who used to be there called Manny Gerard. I think he was present at the time and I may have had a separate conversation with him.

Q. Do you recall having a conversation to that effect with a Mr. Skip Paul?

A. I don't think I was that directly relating to Skip Paul at that time. Someone was negotiating with Skip Paul. I believe Mr. Hadl. Whether or not I ever had any conversations with Mr. Paul or not I don't know. I don't

recollect them. I do recollect the Steve Ross conversation.

Q. Did you tell either Mr. Ross or Manny Gerard that Universal intended to aggressively pursue all licensees of Donkey Kong?

A. I don't believe -- I don't remember what I told him, other than the fact that we were going to protect the property we thought was being infringed. I don't know that I ever said we were going to pursue all licensees of Donkey Kong.

Q. Did you have any conversation with Mr. Newman during the first three months of 1983 with respect to enforcing Universal's alleged rights against Nintendo licensees?

A. With Mr. Newman?

Q. Stanley Newman.

A. The subject is this letter?

Q. That's right.

A. I don't recollect it.

Q. Do you recall having any discussion during the first three months of 1983 with Mr. Newman with respect to Ralston Purina?

A. I have only one recollection with regard to Ralston Purina and that is that there came a point when I was advised that some people from Ralston Purina had come to us and offered us $5,000 for us to give them a blanket

firm generally have access to the personnel of Universal and MCA and merchandising in connection with legal affairs?

MR. KIRBY: Objection, your Honor.

THE COURT: Sustained.

Q. Do you know what the relationship is in terms of the law firm Rosenfeld Meyer and Susman and Universal insofar as contacts with the people are concerned?

MR. KIRBY: Objection, your Honor, asked and answered.

THE COURT: Overruled.

A. The Rosenfeld Meyer and Susman law firm has not only immediate and total access to anyone and everyone and anything and everything that is the business of Universal or MCA but they are as familiar with the people who do what, the policies -- they frequently participate in drafting -- the procedures, the lawyers, the directors as anyone is at MCA.

It is an intimate relationship of counsel to client of long standing.

MR. FAIRHURST: No further questions.

RECROSS-EXAMINATION

BY MR. KIRBY:

Q. When was the last time you had a conversation with Mr. Stephen Kroft?

A. My last conversation with Stephen Kroft was

probably a couple of months ago.

Q. I take it it was not on the subject of King Kong?

A. No. It was on the subject of Atari.

Q. On the subject of?

A. Atari.

Q. At the time you spoke to him Mr. Kroft I take it was alive and in good health?

A. I think he's a new father somebody told me.

Q. Is it your information today that he is in good health?

A. Today? He may have been run over by a car last night.

Q. You have no information suggesting since you last spoke to him that he has come upon ill times, do you?

A. Ill times?

Q. Yes.

A. Not since I last talked to him.

Q. And no one from Rosenfeld Meyer has informed you in the course of your intimate relationship that Mr. Kroft has been sick or mentally incapacitated or anything like that?

A. No one has informed me that he has been mentally incapacitated.

Q. Or sick?

A. I wouldn't expect them to tell me he was sick

unless he had a severe heart attack.

Q. They hadn't told you that?

A. No.

Q. You were asked certain questions by counsel on redirect.

Let me ask you this, Mr. Sheinberg: Do you recall appointing Mr. Hadl director of outside litigation for Universal?

A. Yes.

Q. Do you recall when that was done?

A. No.

Q. Mr. Hadl testified it was done around the beginning of 1981. Does that refresh your recollection?

A. No.

Q. Did you cause a memorandum to be circulated within MCA/Universal with respect to Mr. Hadl's new responsibilities?

A. Yes.

Q. And did that memorandum emphasize that you were concerned about the increasing cost of outside counsel?

A. Yes.

Q. And did that memorandum state that problems were first to be considered in-house and only after Mr. Hadl had concluded that outside counsel should be involved that outside counsel should be involved?